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IN THE

Supreme Court of the United States

October Term, 1971

No. 71 - 292

CLAUDE D. BALLEW and ROBERT MITCHUM, d/b/a MOBILE BOOK MART and CINE-MATICS, INC., a body corporate of the State of Alabama,
Petitioners,

v.

JAMES A. ROBINSON, in his capacity as Chief, City of Mobile Police Dept., WILLIAM H. BRIGHAM, in his capacity as City Attorney for the City of Mobile, JOE A. BAILEY, in his capacity as Mayor in the City of Mobile, LT. JOE ROMAGNANO, as Officer in Charge of Vice Squad, City of Mobile Police Dept., AND in their capacity as members of the Board of Commissioners of the City of Mobile, City Hall: JOE A. BAILEY, LAMBERT C. MIMS and ROBERT B. DOYLE, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case on May 27, 1971.

Opinions Below

Petitioner Ballew and Petitioner Cine-Matics, Inc. filed a Complaint in the United States District Court for the Southern District of Alabama alleging that the Respondents, under color of statute and ordinances of the City of Mobile, Alabama and by virtue of certain statutes of the State of Alabama, were depriving them of their constitutional rights to freedom of speech and press and that the statutes and ordinances were invalid as written and as applied. An Amended Complaint was permitted and filed adding the Petitioner Robert Mitchum hereafter referred to as Mitchum.

It was set forth that Mitchum and Ballew obtained a business license, "Newstand and Books Retail License *No. 8311*", but that attempts to comply with the Mobile City Ordinances and the request for a license of the movie machines was rejected. The Mobile City authorities then had the entire business abated as a nuisance and the machines seized under levy.

His Honor, Judge Daniel H. Thomas, following hearing, on October 16, 1970 filed his "Findings of Fact and Conclusions of Law" and "Judgment and Order" wherein he found each and every statute and ordinance constitutional as written and as applied to Ballew, Mitchum and Cine-Matics, Inc. All requested relief was denied.

Petitioners filed a "Notice of Appeal" November 13, 1970 from the Order of Judge Thomas entered on the 16th day of October, 1970. The Judgment and Order of the trial court are annexed hereto as Appendix "A". The United States Court of Appeals for the Fifth Circuit affirmed the District

Court's decision on May 27, 1971. The Judgment and Opinion of the Fifth Circuit are annexed hereto as Appendix "B".

Jurisdiction

The judgment of the United States District Court for the Southern District of Alabama was entered October 16, 1970. The judgment of the United States Court of Appeals for the Fifth Circuit was entered May 27, 1971. The jurisdiction of this Court is invoked under *28 U.S.C.A. Section 1254(1)*.

Questions Presented

1. May a municipality utilize licensing powers to suppress the dissemination of First Amendment materials?

2. Is an adversary hearing before a competent judicial body required prior to suppression of First Amendment materials by seizures, revocation of licenses and arrests?

3. May a municipality declare the business of the dissemination of presumptively protected First Amendment materials to be a "nuisance" and abate all future dissemination regardless of the obscenity *vel non* of the materials?

4. Are the Ordinances as written and/or as applied herein repugnant to the Constitution of the United States and Amendments thereto?

Constitutional and Statutory Provisions Involved

The pertinent provisions of the *First, Fifth, Sixth, Ninth* and *Fourteenth Amendments* to the *Constitution of the United States*; the provisions of the City of Mobile Obscenity Ordinance No. 36-022, as amended by City of Mobile Obscenity Ordinance No. 41-183; Ordinance No. 34-182, amending the City of Mobile License Code, Section 23-9, Mobile City Ordinances; Title 7, Section 1091, *et seq.*, Alabama Statutes; Title 14, Section 373, Alabama Statutes; Title 37, Section 505, Alabama Statute (Nuisances); and Title 37, Section 506, Alabama Statutes (Nuisances), are all set forth in Appendix "C" hereto.

Statement of the Case

On October 8, 1969, Mitchum opened the "Mobile Book Mart" at 12 S. Conception Street in Mobile, Alabama and obtained a business license *No. 8311* through the efforts of his agent and employee, Ballew. Ballew also applied for a movie machine license from the City of Mobile but this license was refused and the clerk referred him to Lt. Joe Romagnano, the police officer in charge of the Vice Squad in the Mobile City Police Department.

On November 10, 1969, Cine-Matics, Inc. and Robert Mitchum placed eight (8) coin operated movie machines into the store. A list of the serial numbers of the machines was given to the Mobile City License Department together with another request for a license. Cine-Matics' counsel, Mr. Joe Fine, tendered a check to the City in the amount of $120.00 as payment for the license for these eight machines. After being informed that the correct fee was $68.00 the attorney was also referred to the police department. Mr. Fine tendered a check in the correct amount to Lt. Romagnano. The police officer then referred counsel to Mr. William H. Brigham, City Attorney for the City of Mobile, Alabama. Mr. Brigham found it necessary to require the name of the individual operating the movie machines for Cine-Matics, Inc. which information was given the following day.

Ballew, on November 11, 1969, again contacted Lt. Romagnano and was summarily refused the license to operate the movie machines. Ballew commenced operating the machines without the requested license.

On November 17, 1969, Mobile Police Officers entered the "adults only" premises and made purchases of presumptively protected materials.

On November 18, 1969, the Board of Commissioners for the City of Mobile amended the Obscenity Ordinance *No. 36-022* adopted on March 29, 1966 by adopting Ordinance *No. 41-183* which amendment contained an invalid presumption and an insufficient test for the determination of proscribably obscenity.

The same date, the same body amended the licensing Ordinance, *Section One* by adopting Ordinance *No. 34-182* which added *paragraph 414(h)*. This amendment provided an annual license fee for the licensing of coin operated motion picture machines at a rate of $12.00 per machine per week or a total of $624.00 per machine per year. The license fee for the eight machines then became $2,592.00 per annum. The same day Mr. Brigham, Mobile City Attorney, entered the

Mobile Book Mart and advised Ballew of the new ordinances passed that day, copies of which would be available at City Hall.

The Mobile Book Mart did not thereafter, nor did any of the other parties, obtain these purportedly required licenses, but instead continued operating and disseminating the presumptively protected First Amendment materials.

On November 20, 1969, the Mobile City authorities filed suit on behalf of the City in the Circuit Court of Mobile County, Alabama, At Law, *Case No. 30185* naming Cine-Matics, Inc., et al. seeking recovery of $2,496.00 for alleged licensing fees. Pursuant to *Title 37, Section 759* of the *Code of Alabama, 1940* a statutory lien was requested and granted whereby Roy D. Bridges, Sheriff of Mobile County, seized and removed the eight machines. An arrest warrant for operating without a required license was issued for Ballew whereby he was arrested in *Case No. 4G-675* for trial in Municipal Court of the City of Mobile. Ballew posted bond and upon returning to the premises was promptly arrested for violation of the municipal obscenity ordinance *Section 36-022(2)*, as amended designated as *Case No. 4G-680* in the Municipal Court of the City of Mobile. The latter arrest warrant failed to set forth the specific material alleged to be obscene, i.e. Volume and Issue number. No prior adversary hearing was afforded Ballew prior to such arrest. Ballew after posting bond this time returned to the premises where uniformed Mobile City Police Officers made intermittent visits in an effort to intimidate him.

Again on November 20, 1969, Robert B. Boyle, Jr. filed a Complaint in the Circuit Court of Mobile County entitled "A

Bill To Abate A Public Nuisance", in Equity, *Case No. 75773*, with exhibits not named in the Complaint consisting of two magazines, one book, one motion picture film and two tabloids purportedly purchased from Ballew. In essence, the Bill alleged that all parties at the premises were operating "in such a manner as to endanger and damage the morals and well-being of the citizens of the City of Mobile, Alabama," by "Selling . . . magazines . . . books . . . motion picture filmes . . . which are lewd, filthy and obscene in violation of the laws of the State of Alabama and the ordinances of the City of Mobile," and that such manner of operation "constitutes a permanent, constant and continuing assault upon the morals and well-being of the citizens of the City of Mobile" and "will result in irreparable injury to the morals and well-being of the citizens of the City of Mobile so that there is no adequate remedy at law." Temporary and Permanent Injunctions were sought as well as injunctive relief until a hearing was had. His Honor, Judge Ferrill D. McRae, denied immediate injunctive orders finding no substantial injury to result. A hearing was set for November 26, 1969 at 10:30 A.M. Service was served on November 21, 1969, setting out the above hearing date. However, on November 21, 1969, Lambert C. Mims, filed a Motion to Instanter Relief with supporting affidavits. Judge McRae, *ex parte*, without notice or an opportunity to participate afforded the enjoined parties, granted the relief and the *Fiat* setting the hearing date was set aside. Petitioner, in order to avoid being held in contempt, closed his entire business and was effectively barred from dissemination of each and every item of presumptively protected First Amendment materials.

On November 25, 1969, the Board of Commissioners of the City of Mobile, Alabama passed *Resolution 37-893* conditionally revoking business license No. 8311 for being totally or in part devoted to selling or exhibiting obscene materials and operating movie vending machines without a license. A show cause order to Petitioners–Appellants was issued for them to show cause before the Board on December 9, 1969 at 12:00 o'clock why this business license should not be revoked which revocation would be a final order.

On December 9, 1969, at the meeting, the Board adopted *Resolution 37-941* which permanently revoked the business license for lack of sufficient cause shown why the order should not become final.

In summary, the Petitioners in the period from October 8, 1969 to December 9, 1969, had been subjected to two Ordinance amendments, refused a motion picture license, assessed $2,496.00 licensing fees for the period from July 1, 1969, to December 31, 1969, arrested for selling an obscene magazine, arrested for disseminating presumptively protected First Amendment materials through coin-operated motion picture machines, had the machines levied against and seized, received an *ex parte* injunction forbidding the operation of the business as a nuisance, conditional revocation of the business license and thereafter permanent revocation thereof.

How Federal Questions Are Presented

The complaint filed in the District Court for the Southern District of Alabama was a suit for declaratory judgment as to the Constitutionality of the City of Mobile Obscenity and Licensing ordinances; for temporary and permanent injunctions against enforcement of both city ordinances and State Nuisance Statutes pending hearing on the merits; and for damages. Jurisdiction was alleged to be conferred by *Title 28, U.S.C.A. §1343(3)* and *Title 42, U.S.C.A. § 1983*, as well as *Title 28, U.S.C.A., §1343(4)* and *Article III, Section 2* of the *Constitution of the United States.* Prayer for declaratory relief was founded on *Rule 57* of the *Federal Rules of Civil Procedure* as well as *Title 28, U.S.C.A.,§2201.* Injunctive relief was sought under Rule 65 of the *Federal Rules of Civil Procedure.* The jurisdiction of the District Court was also invoked under *Title 28, U.S.C.A., §1331.*

The Judgment and Order of the District Judge found the Ordinances constitutional and constitutionally applied to petitioners and denied all relief sought. The United States Court of Appeals for the Fifth Circuit affirmed. This petition for a Writ of Certiorari is filed within 90 days from May 27, 1971, the date of the Judgment and Opinion in that Court.

Reasons For Granting The Writ

I.

STATUTORY PRESUMPTIONS WITHIN REGULATIONS RESTRICTING FIRST AMENDMENT FREEDOMS ARE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

The legislation under which the Petitioners were charged contains an invalid presumption, i.e.,

> "1.(a) . . . As a matter of State and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated."

There is no agreement among legal authorities as to exactly what a presumption is or how it operates. Most are agreed that a presumption is a legal mechanism, which, unless sufficient evidence is introduced to render the presumption inoperative, deems one fact to be true when the truth of another fact has been established. In legal terminology, the fact which may or must be deemed proved is called the "fact presumed" and will be deemed true if the "fact proved" upon which it rests has been proven. If sufficient evidence is proffered to render the presumption inoperative, the presumption is commonly said to have been "Overcome" or "rebutted."

Since the decision of *Mobile J. & K. C.R.R. vs. Turnipseed, 219 U.S. 35* (1910), it has been fairly certain that the due process requirements of the *Fifth* and *Fourteenth Amendments* will void the operation of presumptive language which works in an unreasonable or capricious manner. Since the decision of *Bailey v. Alabama, 219 U.S. 219* (1911), it has likewise been clear that presumptive language may not be used to circumvent substantive constitutional rights. In the years since *Bailey* and *Turnipseed*, the Supreme Court has struggled to develop tests which isolate the illegal presumption from the allowable presumption. Although the Court has occasionally indicated in dicta that more stringent scrutiny will be given to presumptions operating against criminal defendants than to those operating in civil cases (see *Speiser vs. Randall, 357 U.S. 513, 525)*, the Court has used the same formulae to judge the legitimacy of presumptions in both areas. Only in *Leary vs. United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), did the Court finally give express recognition to the proposition that a more stringent standard might be required in criminal cases, but the question was left unanswered.

Petitioners contend that the cited provision involving a legislated presumption is unconstitutional on its face. Specifically the statute violates the *First, Fifth, Sixth, Ninth* and *Fourteenth Amendments* to the *Constitution of the United States* in that:

(a) It violates the due process clause of the Constitution; more particularly it is repugnant to a superior presumption that *First Amendment* materials are protected under the *Constitution of the United States;*

(b) It denies equal protection of the laws:

(c) It compels the accused to give testimony against himself;

(d) The defendant is no longer provided a jury trial upon the elements presumed, inasmuch as he is deprived of the untrammeled response of the jury as to that element;

(e) Since the determination of the presumed element is automatic, the defendant is denied a trial altogether on that element; the trial as to that element was conducted in the hearing rooms and the floors of the legislative branch, or was effected by case-law development to which he was not a party;

(f) As a corollary to (e), the defendant was not allowed to confront his "accusors;"

(g) The defendant may be punished, not as a result of all elements of the crime having been proved beyond a reasonable doubt, but for not having risen to his own defense, which, of course, is no crime.

Any discussion of statutory criminal presumptions may well begin with the recent case of *Leary v. United States,395*

U.S. 6, 89 S.Ct. 1532, 23 L. Ed. 2d 57 (1969). There were two issues in that case, namely (1) the propriety of the conviction of Dr. Timothy Leary for having transported (etc.) marijuana without having paid a transfer tax and (2) the propriety of a conviction for having knowingly transported (etc.) marijuana which had been illegally imported or brought into the United States.

We are not here concerned with the first question, Consideration of the second question involved an inquiry into the presumption, created by Congress, that possession of marijuana

> "shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

It will be noted, then, that the presumption involved in *Leary*, was rebuttable.

The presumption involved in *Leary* was actually two presumptions, to wit, (1) the marijuana was illegally imported and (2) the defendant knew it. The Supreme Court invalidated the presumption of knowledge, and found it unnecessary to rule on the presumption of illegal importation.

As the Court pointed out, statutory presumptions in criminal cases have been, in the past, tested by one or more of three tests. These tests were the following:

(1) Is there a rational connection between the facts proved and the facts presumed?

(2) Is it more convenient for the defendant or the government to supply proof of the ultimate fact which the presumption permits to be inferred?

(3) Might a legislative body legitimately have made it a crime to commit the basic act from which the presumption allows an inference to be drawn?

If those tests were applied in *Leary* the questions would have been these:

(1) Is there a rational connection between proof that Dr. Leary had marijuana in his possession and an inference that he knew it was illegally imported? (The presumption not reviewed by the Court was that the marijuana had, *in fact,* been illegally imported.)

(2) Would it be more convenient for Dr. Leary or for the government to produce evidence regarding the extent of Dr. Leary's knowledge?

(3) Could Congress constitutionally have made possession of marijuana a crime without regard to whether Dr. Leary knew that it was illegally imported?

In *Leary*, the Supreme Court considered that *Tot v. U.S., 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241* (1943), had completely rejected the third test. It was immaterial whether Congress might have created a different crime, since it had not.

According to *Leary,* the second, or comparative convenience test has the status of a "corollary," *23 L. Ed. 2d* *at p. 80,* while the principal test is rational connection. Apparently that means that in order to be valid a presumption must pass muster under *both* the rational connection and the comparative convenience tests. That seems to be the necessary conclusion from this language of the Court in *Tot:*

> *"The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship."* 319 U.S. at 469, 470. (Emphasis supplied).

The rational connection test is more than merely a test of relevance or admissibility. In *United States v. Romano, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 21 210* (1965), the statutory presumption was that a defendant's presence at an illegal liquor still authorized the jury to infer that he had possession, custody or control over the still. Holding the presumption invalid, the Court said:

> "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt – 'the inference of the one from proof of the other is arbitrary . . . ' " 382 U.S. at 141.

The Court, in *Leary,* phrased the question in this way:

> "The upshot of Tot, Gainey and Romano is, we think, that a criminal statutory presumption must be

> regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 23 L. Ed. 2d at 82.

It is at this point that the Court raises, but finds it unnecessary to answer, the question whether a criminal presumption must satisfy a beyond reasonable doubt test. That is, in order for a presumption to be valid must it be true beyond a reasonable doubt that the inferred fact flows from the proved fact? Though the Court did not decide this question, it did cite, with apparent approval, *United States v. Adams, 293 F. Supp. 776* (S.D.N.Y., 1968). In fact, later on, in Note *116,* it cited *United States v. Adams* with approval, as being "the only lower court which conducted a factual inquiry in any way comparable to our own."

The *Adams* case, then, is of some importance, particularly on the question whether the inferred fact must follow beyond a reasonable doubt from the proved fact. At *293 F. Supp. 783,* the Court said:

> "While it has not commonly been featured in the standard formulations (but see Mr. Justice Black, dissenting in *United States v. Gainey, supra,* 380 U.S. at 82, 93, 85-86, 85 S. Ct. 754), it is fitting to stress that our problem is in the setting of a criminal prosecution. No authority in any relevant context has ever suggested that the statutory inference was intended, *or may property serve,* to lighten the prosecution's burden of proof beyond a reasonable doubt." (Emphasis supplied).

It would appear then that the presumption attacked here is invalid unless it meets both the rational connection test and the comparative convenience test. The rational connection gest probably requires validity of the inference beyond a reasonable doubt but, at the very least with "substantial assurance." Another possible way of stating the matter, from *United States v. Adams, supra,* at p. *783,* is as follows:

> "While the point has not been, and probably cannot be, put statistically, it ought 'rarely' to be the case that the inference will be contradicted by the actual experience of relationships in the real world."

Can the presumption herein survive scrutiny under this test (or any of these tests, if they differ)? Clearly, the answer seems to be that it cannot.

The question is empirical and depends upon common experience and "the circumstances of life as we know them . . ." *Tot v. United States, 319 U.S. at 467.* The process by which the test is applied to the presumption is well exemplified by *Leary,* in which the Court canvassed the available, pertinent data (see 23 L. Ed. 2d at 83), and *United States v. Adams, supra,* in which the Court consulted books, legislative hearings, administrative reports and newspaper stories.

Is it only in rare cases that those conclusions will be contradicted by actual experience? This brings us to two questions:

(1) Is the major premise true?

(2) If it is true, is it proper to convict one of a crime if all that can be said with respect to a major element of the crime is that it is "more likely than not" to be true?

We think the answer to the second question is surely that it would be improper and that the presumption is accordingly invalid under any of the formulations of the rational connection test.

The expression "more likely than not" covers a situation which holds true in 50.001% of the cases and one which holds true in 99.999% of the cases, and all situations between. Obviously, as the probability contained in the major premise approaches 100% then the presumption becomes more and more supportable and at some point it becomes supportable "beyond a reasonable doubt" and it is only in the rare case that the presumption would be contradicted by actual experience. As the Court said in *United States v. Adams, supra,* at p. *783,* "the point has not been, and probably cannot be, put statistically" but that does not alter the fact that it is necessary to examine the degree of probability of the major premise.

Even if the presumptions did not fall under the first test, they would fall under the comparative convenience test. Clearly, to require a criminal defendant to prove the error of the presumption and its invalidity may require him to take the stand in spite of the *Fifth Amendment* privilege not to do so. It may be said that the defendant is the person with the best access to the pertinent information, that is, to knowledge of his own intentions, with respect to the fact presumed. But such an argument may be introduced in any criminal case, it is the Constitutional provision contained in the *Fifth Amendment* which affords the accused protection from such compelled testimony.

As applied particularly to the case at bar, there is no particular reason for imposing the burden on the defendant.The presumption serves no purpose other than to shift the burden of proof to the defendant. Is the presumption necessary? Surely the prosecution with all of the resources readily available to it, can elicit such testimony from individuals other than the defendant, and these are external facts, from which a jury, on proper instructions, might draw conclusions of fact. They are facts that are accessible to the prosecutor as to the defendant. Considering the ordinary fact that the prosecutor generally has greater resources than the defendant, it is unfair and imposes an unjust burden to cast the burden of proof upon the defendant by means of a presumption.

The only fact which is more accessible to the defendant is the subjective evidentiary fact which can only come from the defendant's own testimony. The only function of the presumption is to force the defendant to testify.

It is necessary that the statutory presumption contained herein be read in the context to which the presumption applies: a statutory scheme to regulate *First Amendment* freedoms.

While, admittedly, Courts have suggested that "obscenity," once precisely circumscribed, does not necessarily fall within the ambit of the *First Amendment* and is not too vague and indefinite to be proscribed, Courts have nonetheless repeatedly held that because "constitutionally protected expression . . . is often separated only by a dim and uncertain line; any attempt, be it Federal or State, to regulate or suppress allegedly obscene material must be closely scrutinized to the end that protected expression is not abridged in the process. *Delta Book Distributors, Inc. v. Cronvich,* 304 F. Supp. 662 (1969), vacated and remanded on other grounds *sub nom. Perez v. Ledesma,* 401 U.S. 82 (1970). This recognizes the principle that all expression is presumptively protected by the First Amendment and "a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. *A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; Cambist Films, Inc. v. Tribell, 293 F. Supp. 407* (E.D. Ky. 1968). Which presumption then is superior? (A distinction is to be made here to the so-called "liquor presumption" cases where no constitutional guarantee is involved.

In *Morrison v. California, 291 U.S. 82, 90-91, 78 L. Ed. 664, 670-71* (1933), Mr. Justice Cardozo, delivering the opinion for the Supreme Court, explained that the statutory criminal presumption there involved was invalid:

> "What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' There are indeed, 'presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.' Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance or if this at times be lacking, there must be a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an

> exception . . . The decisive considerations are too variable, too much distinctions of degree, too dependent in the last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula."

In transferring the burden of proof to a criminal defendant, can the government justify such an abrogation of due process, especially in the Constitutionally preferred area of *First Amendment* freedoms? The key to the answer to each of these questions is found in the Supreme Court decisions, holding the Louisiana Subversive Activities and Communist Control Law and Communist Propaganda Control Law containing a statutory presumption unconstitutional on its face. In *Dombrowski v. Pfister, 380 U.S. 479, 496, 14 L. Ed. 2d 22, 34, 85 S. Ct. 1116* (1965), Mr. Justice Brennan reiterated the principle articulated in *Speiser v. Randall, 357 U.S. at 526:*

> "Where the transcedent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. It follows that 364 (7), resting on the invalid presumption, is unconstitutional on its face."

Therefore the answer to each of these questions is necessarily: No.

Therefore it is not a valid presumption that obscenity is utterly without social value. For evidence must be produced to meet the burden of the tripartite tests set forth by the United States Supreme Court in the determination of proscribable obscenity.

It also cannot be presumptively stated that obscenity is without social value and constitutes an abatable nuisance. For not all obscenity can be a nuisance much less proscribable, *Stanley v. Georgia, 394 U.S. 557* (1969) and *Redrup v. New York, 386 U.S. 767* (1967).

II.

ABATEMENT OF ALLEGED NUISANCE NOT SUFFICIENT JUSTIFICATION FOR PRIOR RESTRAINT OF FIRST AMENDMENT FREEDOMS.

Nuisance prevention legislation is historically founded upon the thesis that one may use his property in any manner he deems fitting to the limitation that this use shall not infringe upon his neighbor's use of property adjacent thereto or upon the health, safety, comfort or morals of the community. To constitute a nuisance, the act, structure, or device complained about must cause some injury, real and not fanciful, *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission, 216 N.E. 2d 788,* and a nuisance must affect either the comfort, morals or health of the public to fall within statutory classification, *Sparks v. City of Pella, 137 N.W. 2d 909* (Iowa).

A nuisance may be either private or public, *Bishop Processing Co. v. Davis, 132 A.2d 445* (Md). For the condition to be a public nuisance it must produce a common injury and constitute an obstruction to public rights, *Mandel v. Pivnick, 125 A.2d 175* (Conn); and may be proscribed if the activity be harmful to the public health, create an interference with a way of travel or the peaceful use of public land and streets, *Garfield v. Young, 82 N.W. 2d 876* (Mich).

Similarly, nuisances have been found to exist in the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal, and the producing of such material annoyance, inconvenience, discomfort or hurt thereby that the law may abate it, *Commonwealth v. Baird, 41 Erie 200* (Penna); *Chaflin v. Glick, 177 N.E. 2d 293* (Ohio); *State ex Rel Bove v. Hill, 167 A.2d 738* (Del); *Westwood Development Co. v. Esponge, 342 S.W. 2d 623* (Tex); and *Harting v. Milwaukee County, 86 N.W. 2d 475* (Wis).

The various legislatures are empowered and have great latitude in regulating activities that affect the community as a whole. The contrary is true, however, when such regulations infringe upon the freedoms guaranteed by virtue of the *First Amendment* made applicable to the states under the *Fourteenth Amendment.* The Supreme Court of Texas in *State v. Spartan's Industries, Inc., 447 S.W. 2d 407* stated the following of the state's police power in regulating purported nuisances:

> "It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is declared to be a nuisance endangers the public health, public safety, public welfare, or offens the public morals."

In the freedoms of speech and press, the protected works include not only books and newspapers but magazines, films, pamphlets and leaflets. It not only protects the creation but the publishing and circulation. The Supreme Court of the United States in *Lovell v. Griffin, 303 U.S. 444* stated:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise'. There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse of littering of the streets.
>
> . . . "The ordinance cannot be saved because it relates to distribution and not to publication. *'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'* Ex parte Jackson, 96 U.S. 727, 733, 24 L. Ed. 877, 879. The license tax in Grosjean v. American Press Co., 297 U.S. 233, 80 L. Ed. 660, 56 S. Ct. 444, supra, was held invalid because of its direct tendency to restrict circulation." (Emphasis supplied.)

The Supreme Court has held that this freedom of speech and press is a fundamental right and legislative preference in selection of modes in combating purported evils is insufficient justification for imposition of unconstitutional "prior restraint." It is not occasional abuse of censorial power that is prohibited but the threat inherent in censorship of any nature that creates the danger to these freedoms. The Court in *Thornhill v. Alabama, 310 U.S. 88* stated:

> "First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.
>
> . . .

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.
>
> . . .
>
> "But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The State of Alabama in that case argued that the purpose of the legislation limiting freedom of discussion was to protect the community from violence and breach of the peace arising out of picketing. The Supreme Court rejected this contention as there was no clear and present danger of destruction of life or property or of a breach of the peace.

The United States Supreme Court as early as 1931 was confronted with a state limitation on *First Amendment* freedoms utilizing the concept that the exercise of those rights constituted a nuisance in the type and manner of speech and the type and manner of its dissemination. There the District Court of Hennepin County, Minnesota adjudged a publication disseminated by "Near" to be a nuisance in that it was a "malicious, scandalous and defamatory newspaper" and thereafter enjoined further like publications. The Supreme Court of Minnesota affirmed on appeal the lower court judgment. The Supreme Court of the United States reversed and held as unconstitutional the portions of the statute permitting the restraint upon *First Amendment* freedoms by declaring such activity a nuisance and permitting injunctions against future publications and dissemination. The Court there in *Near v. Minnesota, 283 U.S. 697,* stated the following of the statute and the Court's reasoning:

> "Section 1: Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away,
>
> "(a) an obscene, lewd an; lascivious newspaper, magazine, or other periodical, or
>
> "(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,
>
> "is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.
>
> . . . "At the beginning of the action on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical

from September 24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, 'any future editions of said 'The Saturday Press' and 'any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise.'

. . .

"This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of persons and property.

. . .

"This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

. . .

"Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The Court then quoted with approval from *Patterson v. Colorado*, 205 U.S. 454:

> "In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."

and thereafter stated:

> "In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.
>
> . . .
>
> "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.

Under the reasoning set forth by the United States Supreme Court over three decades ago it is patently true that a state may not declare the dissemination of *First Amendment* materials to be a nuisance. Similarly these freedoms may not constitutionally be enjoined.

Since *Near v. Minnesota,* supra, courts have been called upon numerous times to delineate the power of the legislatures to enact legislation limiting *First Amendment* freedoms. The United States Supreme Court in *Butler v. Michigan,* 352 U.S. 380 (1957), reversed a state court conviction and held the Michigan statute as unconstitutional in limiting the exercise of these freedoms and of the right of the public to receive them, stated:

> "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence it is exercising its power to promote the general welfare.
>
> . . .
>
> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."

These courts have placed the bounds on the restrictions at the point where the exercise of these freedoms would constitute a clear and present danger to society and government, *American Communications Assoc. C.I.O. v. Douds,* 339 U.S. 382; *Schenk v. U.S.,* 249 U.S. 47, and *Bridges v. California,* 314 U.S. 252.

The County of Los Angeles attempted to preclude the dissemination of crime "comic books" to persons under 18 years of age but the statute was found to be unconstitutional for not adhering to the necessity of a clear and present danger, *Katzev v. County of Los Angeles,* 341 P.2d 310.

The United States Supreme Court again in *Cantwell v. Connecticut,* 310 U.S. 305 delineated some of the limitations upon state restrictions of *First Amendment* freedoms and stated:

> "Thus the Amendment embraces two concepts,–freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.
>
> . . .
>
> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. *Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.*" (Emphasis supplied.)

In that case Cantwell had been convicted of the crimes of soliciting without a license and Breach of the Peace for extolling the view that all religions and in particular Catholicism was bad. The United States Supreme Court reversed those convictions.

The United States District Court for the Southern District of New York in *Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (1968) had before it a matter where an injunction was sought to prevent the publication of magazine articles. Judge Pollock denied the injunction as such a request was repugnant to the principles of the *First Amendment* and the courts of equity and stated:

> "A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech.
>
> "To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, Crosby v. Bradstreet Co., 312 F.2d 483, (2d Cir. 1963); Parker v. Columbia Broadcasting System, Inc., 320 F.2d 937 (2d Cir. 1963); cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), and to historic principles of equity. American Malting Co. v. Keitel, 209 F. 353 (C.C.A. 2, 1913).
>
> "The motion for an injunction is therefore denied." (Emphasis supplied.)

An appellate court of New Jersey recently had a matter involving the proscription of a film before it in that the film was deemed by the officials as obscene and proscribable. The court therein *Lordi v. V.A. New Jersey Theaters, Inc.*, 259 A 2d 734, stated:

> "While the State has an interest in and may prevent the dissemination of material deemed harmful to children, that interest does not justify a total suppression of such material, for to do so would reduce the adult population to seeing and reading only what is fit for children. *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed. 2d 412 (1957); *Jacobellis v. Ohio*, supra."

What the New Jersey court held there is appropo to the case at bar. The state interest does not justify a total suppression of such material irrespective whether the dissemination may be alleged to constitute a nuisance.

A court of equity will not and should not interfere or abate as a nuisance everything which may work, hurt, inconvenience, or damage but under most authorities in order to call for such interference, it must appear that the injury resulting from the alleged nuisance is or will be irreparable. It must be conceded that the dissemination of a publication will not work irreparable harm.

In the case of *Speiser v. Randall*, 357 U.S. 513, 525 (1958), the United States Supreme Court stated:

> "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . .and the reportation of legitimate from illegitimate speech calls for. . .sensitive tools."

In a case involving in essence the questions common to the present proceedings, of "prior restraint" and "chilling effect" on the exercise of *First Amendment* rights, the Supreme Court in a case styled, *Freedman v. Maryland,* 380 U.S. 51, at 60 (1965), stated:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme, is, of course, for the State to decide. But a model is not lacking; in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. *That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing."* (Emphasis supplied.)

In a case decided by the Supreme Court in 1968, *Teitel Film Corporation v. Cusack, et al,* 390 U.S. 139, the Court again made comment about the necessity for procedural safeguards in the sensitive area of *First Amendment* rights. See also *Kingsley Books, Inc. v. Brown,* 354 U.S. 536; *A Quantity of Books v. Kansas,* 378 U.S. 205, 209; and *Blount v. Rizzi,* 400 U.S. 410 (1970).

Finally, in November 1968, the Court issued its unanimous opinion in a monumental decision entitled, *Carroll v. President and Commissioners of Princess Anne, et al,* 393 U.S. 175 and on the issue of *ex parte* injunctions in *First Amendment* cases, stated:

> "There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First

> Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. 'Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity', *Bantam Books v. Sullivan,* 372 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland,* supra, at page 58, a non-criminal process or prior restraints upon expression 'avoid constitutional infirmity only if it takes place under procedural safeguards, designed to obviate the dangers of the censorship system'."

In *Gundlach v. Rauhauser,* 304 F. Supp. 962 (1969), the United States District Court for the Middle District of Pennsylvania, Three Judge Court, in declaring a section of that State's obscenity statute to be constitutionally deficient and in permanently enjoining the District Attorney from further proceeding against the plaintiff under that section, stated on page 963:

> "It will be noted that Section (g) of the Pennsylvania Act authorizes the District Attorney to institute proceedings in equity for the purpose of enjoining the sale and distribution of any written or printed matter of an obscene nature. Moreover, Section (g) specifically provides for the issuance of a preliminary injunction, ex parte, upon the averment of the District Attorney that the sale or distribution of such publication constitutes a danger to the welfare or peace of the community.

> "We need only consider point (a) as it is apparent that Section (g) is defective, in that it provides for the issuance of a preliminary injunction, without notice, in an area involving 'basic' freedoms guaranteed by the First Amendment' and, further, that it fails to establish the necessary procedural safeguards to insure prompt and final judicial decision."

In the case styled, *HMH Publishing Co., Inc. v. Oldham,* 306 F. Supp. 495 (1969), the United States District Court for the Middle District of Florida, Ocala Division, vacated a state court *ex parte* injunction restraining the sale of the magazine *Playboy.* See also the case of *Commonwealth of Pennsylvania v. Guild Theatre, Inc., et al.*. 248 A.2d 45; *Grove Press, Inc. v. City of Philadelphia,* 300 F. Supp. 281 (1969); appealed to the U.S. Court of Appeals for the Third circuit, *Grove Press Inc. v. City of Philadelphia,* 418 F.2d 82 (1969); *Schneider v. Irvington,* 308 U.S. 159; and *Terminiello v. Chicago,* 337 U.S. 1.

The Complaint filed by the State, although lacking any affirmative showing of compeling need, would perhaps rely upon the concept that the State Attorney is attempting to protect society in one of three ways:

(1) Sales to minors under a state statute reflecting a specific and limited concern therefore;

(2) Sales to individuals that cause anti-social conduct,

(3) Sales to individuals whose morals may be impaired by the alleged salacious appeal of this material.

In the more than three decades since *Near v. Minnesota,* the law has not been altered in any respect to permit the state to do by indirect means that which it could not do directly.

Therefore based upon the holding of *Near* and the subsequent cases it is apparent that no state may constitutionally suppress publication merely upon the basis that their dissemination constitutes a nuisance.

III.

THE LICENSING ORDINANCE IN QUESTION AS IT PURPORTS TO REGULATE THE COMMERCIAL EXERCISE OF FIRST AMENDMENT FREEDOMS IS UNCONSTITUTIONAL.

As the Supreme Court said in *NAACP v. Button,* 371 U.S. 415, (1963):

> "Broad prophylactic rules in the area of free expression are suspect. . .
>
> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

The Supreme Court in speaking of prior restraint in the area of protected expression stated, in *Freedman v. Maryland,* 380 U.S. 51:

> "Although the Court has said that motion pictures are not 'necessarily subject to the precise rules governing any other particular method of expression,' *Joseph Burstyn, Inc., v. Wilson,* 343 U.S. 495, 503,

> 96 L.Ed. 1098. 1106, 72 S. Ct. 777, it is as true here as of other forms of expression that '(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . .
>
> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

In *Interstate Circuit v. Dallas,* supra, the Court there stated:

> ". . .the absence of narrowly drawn, reasonable and definite standards for the officials to follow. . .is fatal."

Again in *Shuttlesworth v. Birmingham,* 89 S. Ct. 935 (March 10, 1969) the Supreme Court struck down a licensing permit ordinance as being unconstitutional wherein a public official could grant or deny a permit (parade) for the dissemination of ideas based upon their discretion:

> "This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional. 'It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of

> an official as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277, 282, 2 L. Ed. 2d 302."

The municipal authorities argued that parade permits did not fall into the same category as those of "pure speech." The Court countered this supposition with the following:

> "It is argued, however, that what was involved here was not 'pure speech,' but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that 'the First and Fourteenth Amendments (do not) afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S. Ct. 453, 464, 18 L.Ed.2d 471. 'Government authorities have the duty and responsibility to keep their streets open and available for movement.' Id., at 554-555, 85 S. Ct. at 464.
>
> "But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection."

The principles enunciated in *Freedman v. Maryland*, supra, although involving a censor board, state that in the area of *First Amendment* freedoms the censor must within a brief specified period of time either issue a license for the film or go forward in the courts to restrain the showing of that film with the burden upon the censor board to show why the license should not be granted. The legislation should also provide for a prompt final judicial adjudication. The Supreme Court in *Freedman* states:

> "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See *Bantam Books, Inc. v. Sullivan,* supra. Therefore, the procedure must also assure a prompt effect of an interim and possibly erroneous denial of a license."

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967):

> "We emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms'. . .the danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. . .vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross references to interrelated enactments and rules."

The City of Birmingham had a licensing ordinance requiring the application for and issuance of a permit prior to conducting a parade. The United States Supreme Court in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L.Ed. 2d 162 (1969) included that activity within the ambit of the *First* and *Fourteenth Amendments* as a form of protected speech and stated of the ordinance alleged to be violated:

> "For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, unconstitutional."

The Court again in *Bantam Books v. Sullivan*, 375 U.S. 58 (1953) stated:

> ". . .any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity."

In *Freedman v. Maryland*, supra, the Court dealt with the licensing ordinance whereby films were to be submitted to the board and licensed prior to their dissemination. The Court summarized the defects of the statute and suggested that among other things, the problem that a citizen may be convicted for failing to have a license under the statute after first seeking a license and having been refused even though no judicial body had ruled upon the matter. The Court in its opinion stated:

> "The Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited, pending judicial review, however, protracted. *Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though the Court had never ruled on the obscenity of the film.* Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the Section 2 requirement of prior submission of films to the Board an invalid previous restraint." (Emphasis supplied)

The United States Supreme Court struck down a licensing ordinance which they viewed as having been enacted for the purpose of censorship in the City of Chicago requiring persons desiring to show films to the public to first submit an application and obtain a permit from the Chief of Police. The Chief of Police would act in the capacity of a censor and refuse permits for those films he may deem to be obscene. In *Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968), the Court summarized the relevant pertinent provisions of the censorship ordinance as follows:

> "The Chicago Motion Picture Censorship Ordinance prohibits the exhibition in any public place of 'any picture. . .without first having secured a permit therefor from the superintendent of police.' The Superintendent is required 'within three days of receipt' of films to 'inspect such. . .films. . .or cause them to be inspected by the Film Review Section. . .and within three days after such inspection' either to grant or deny the permit. If the permit is denied the exhibitor may within seven days seek review by the Motion Picture Appeal Board."

The Court then went on to discuss the defects within the ordinance as follows:

> "The Illinois Supreme Court held 'that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants.' 38 Ill. 2d at 63, 230 N.E. 2d at 247. We disagree. In *Freedman v. Maryland,* 380 U.S. 51, 58-59, 13 L.Ed. 2d 649, 654, 655, 85 S.Ct. 734, we held '. . .that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . .To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, *within a specified brief period,* either issue a license or go to court to restrain showing the film. . . (T)he procedure must also assure a *prompt final judicial decision* to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied). The Chicago censorship procedures violate these standards in two respects."

The United States Supreme Court, in its decision entitled *Shuttleworth v. Birmingham,* supra, had occasion to reflect upon the past decisions of that Court dealing with laws subjecting the exercise of *First Amendment* freedoms to the prior restraint of a license without providing for narrow, objective, and definite standards to guide the licensing authority and/or licensing fees even handily applied. Several of the cited cases and surrounding circumstances are as follows:

1. *Lovell v. City of Griffin,* 303 U.S. 444 (1938), the ordinance involved forbid distribution of circulars, handbooks, advertising or literature of any kind without a permit. The appellant there did not apply for a permit and was arrested for failing to secure one. In its opinion the Court found the ordinance unconstitutional and stated:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction and its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.
>
> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of

Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' ".

2. *Schneider v. State,* 308 U.S. 147 (1939): A City ordinance prohibited canvassing without a permit from the Chief of Police. Appellant had not even applied for the permit. The State argued that the Ordinance was reasonable and proper in the exercise of its police powers in furtherance of the public welfare and the constitutional rights of freedom of speech and press are properly subject to the same.

The Court held, however, that the State cannot limit dissemination of ideas acting as a censor on the discretion of a police officer.

3. *Cantwell v. Connecticut,* 310 U.S. 296 (1940): A state statute was involved prohibiting soliciting money for charitable organizations without prior approval of the Secretary of the Public Welfare Council. The appellant did not apply for a permit and was arrested for selling books, playing records and soliciting funds without such approval. The Court held that the action and the required approval violated the concept of "Liberty" embodied in the Fourteenth Amendment as it relates to the exercise of freedoms within the First Amendment. The Court reversed the conviction and commented thus upon the State's right to enforce its police power by requiring permits:

> "We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of

> the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which and would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact."

4. *Saia v. New York,* 334 U.S. 558, 68 S. Ct. 1148, 92 L.Ed. 1574: A city ordinance required a permit prior to the use of a loudspeaker or amplifier. The Court found the ordinance unconstitutional as it constituted a prior restraint upon the right of free speech in violation of the *First Amendment* which is protected by the *Fourteenth Amendment* against state action. In that case the appellant was arrested for using a loudspeaker without the permit issued to him.

5. *Kunz v. New York,* 340 U.S. 290 (1951): An ordinance of New York City required a permit from the Police Commissioner prior to holding public worship gatherings upon the streets. The appellant applied several times for the permit and was refused. He was later arrested for holding the public worship gatherings without the permit. The Court said:

> "It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his actions. Reversed."

6. *Niemotko v. Maryland*, 340 U.S. 268 (1951): A city did not have an ordinance but through custom required citizens wishing to use the public parks for gatherings or meetings to secure approval from the Park Commissioner. An appeal was granted also by custom to the City Council. The appellant applied for permission to use the park but was denied. He then proceeded to hold his Bible talks in the park without the customary permission of city authorities and was subsequently arrested as a result. The Court revised the lower court and conviction and in doing so Mr. Justice Frankfurter in his opinion stated:

> "Administrative control over the right to speak must be based on appropriate standards, whether the speaking be done indoors or out-of-doors. The vice to be guarded against is arbitrary action by officials."

7. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), where a New York statute required a valid license or permit be obtained from the Educational Department prior to showing any films in the state. Appellant sought and obtained a permit for a certain movie. After the movie had been shown for some period of time the permit or license was rescinded as being "sacreligious." The Court there held specifically that a motion picture was within the ambit of protections which the First Amendment, *through the Fourteenth Amendment*, secures to its citizens. The Court further stated.

> "We fail to see why operation for profit should have any different effect in the case of motion pictures."

8. *Staub v. City of Baxley*, 355 U.S. 313 (1958): A Georgia city ordinance required persons seeking to solicit members for any organization requiring the payment of dues

to obtain a permit from the Mayor and City Council. Appellant did not seek the permit but through his employment as a labor organizer went to various homes and spoke to the employees of a company in an attempt to have them join the Union. He was arrested for the violation of the city ordinance. The rationale of the United States Supreme Court was that the *Fourteenth Amendment* precludes state invasion in the exercise of *First Amendment* rights and a municipal ordinance adopted under state authority is state action. The peaceful enjoyment of the protected freedoms if restricted through state action by requiring a license or permit is unconstitutional censorship or prior restraint. The Court reversed the appellant's conviction on that violation, and stated:

> "It is undeniable that the ordinance authorized the Mayor and Council of the City of Baxley to grant 'or refuse to grant' the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance on its face imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays 'a forbidden burden upon the exercise of liberty protected by the Constitution.' (*Cantwell v. Connecticut*, supra, 310 U.S. at 307). Therefore, the judgment of conviction must fall."

9. *Cox v. Louisiana*, 379 U.S. 536 (1965): A state statute was declared invalid for overbreadth to the extent that it invaded the freedoms guaranteed to the citizens under the *First* and *Fourteenth Amendments*. In that case a civil rights

leader utilized the medium of organized marches and picketing to protest acts of the local authorities. He was arrested for violating the statute prohibiting "breach of the peace." The Court held that such conduct upon the part of appellant was a form of speech protected by the United States Constitution and that the Louisiana statute as written and construed was void for overbreadth thereby invading the area of protected freedoms by not providing the officials adequate standards and safeguards limiting their actions.

10. *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 876 (1968): A city ordinance contained classifications of motion pictures and further provided that all films must be submitted for classification prior to their showing. The appellant applied to the censor board and the application and license was rejected. The Court struck down the Dallas ordinance in that it failed to state narrowly drawn, reasonable, and definite standards for the board to follow.

The licensing ordinance applicable herein set forth as *Paragraph 414* of the *Mobile City License Code* at the time Ballew applied for the license did not have a required license fee. After the application was made the City authorities saw fit to amend the legislation requiring a fee of $12.00 per week per machine. In order to disseminate presumptively protected *First Amendment* materials, i.e. films to willing adult individuals, the disseminator was forced to pay a prohibitive licensing fee. Whereas an entire movie theater utilizing the maximum allowable showings only pays $440.00 per year (T. 183) and a coin operated music box only pays $25.00 per year (T. 180). This is true although it was stated as early as 1788 in the case of *Republica v. Oswald,* 1 U.S. 319, 1 Dall. 319, 1 L.Ed. 155 that the press and speech are free in this country and cannot be restrained or a license imposed. And it was this purpose that lead to the adoption of the *First Amendment, Lovel v. Griffin,* supra.

Conclusion

The Petitioners operating an "Adults Only" book store sought to comply with all reasonable valid regulations. A business license was applied for and obtained. A license was applied for in order to disseminate through the medium of coin operated motion picture machines. This last manner of dissemination was objectionable, apparently, to the municipal authorities of the City of Mobile, Alabama. The license was not issued and the governing body assessed exhorbinant and prohibitory license fees upon the machines. When good faith reliance was placed upon an applicable United States Supreme Court decision *(Shuttlesworth v. Birmingham)* the result was that for only a portion of the licensing year the authorities sued for and assessed these monumental fees. The authorities levied upon and seized the machines barring their use. Arrests were made for purported obscenity charges and operating without required licenses. This still did not satisfy the municipal authorities for they achieved total suppression by revoking the business license barring even the dissemination of books and printed materials irrespective of the nature. Then the ultimate repression was enacted. The entire business was forcibly closed by order of court where it was merely alleged that it constituted a nuisance and endangered the morals and well-being of the citizens of Mobile. Injunctive relief, granted *ex parte* even on the day of service of the original complaint was had without an opportunity afforded to participate.

The lower court herein found each and every procedure followed to be constitutionally permissible as well as the validity of the statutes under which these procedures operated. His Honor, Judge Thomas, found no "censorship" or "prior restraint" or "suppression". Contrary to this finding the results are that there is not just a prior restraint but in reality a total suppression.

If this decision is left to stand, no person, newspaper, magazine or other entity will be safe and secure in exercising these most precious freedoms. Left standing, this decision nullifies those decisions from the earliest time in our country's history down to today for any citizen in the corporate limits of the City of Mobile, Alabama.

Therefore, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Judgment and Order

(Number and Title Omitted.
Filed October 16, 1970)

In conformity with a memorandum opinion filed contemporaneously herewith:

It is ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) is constitutional as written and petitioners' prayer to have the ordinance declared void is hereby denied.

2. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

3. Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been applied to petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of enforcement is denied.

4. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, are constitutional as written and petitioners' prayer to have the ordinances declared void is hereby denied.

5. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

6. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been applied to

petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of application is denied.

7. Code of Alabama, Title 37, Sections 505 and 506 are constitutional as written and petitioners' prayer to have the statutes declared void is hereby denied.

8. Code of Alabama, Title 37, Sections 505 and 506 have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied, as applies to Case No. 75773 in the Circuit Court of Mobile County, Alabama, in Equity.

9. Code of Alabama, Title 37, Sections 505 and 506 have not been applied to petitioners in an unconstitutional manner, in Case No. 75773 in the Circuit Court of Mobile County, Alabama, and the petitioners' claim for relief is denied.

10. Petitioners claim for relief in all other aspects is denied.

Done this 16th day of October, 1970.

/s/ Daniel H. Thomas
DISTRICT JUDGE

U.S. District Court
Sou. Dist. Ala.
Filed and entered this the
16th day of October 1970
Minute Entry No. 27859
William J. O'Connor, Clerk
By /s/ William Taylor
Deputy Clerk

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1030

CLAUDE D. BALLEW, ET AL.,
Petitioners-Appellants,

versus

JAMES A. ROBINSON, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

(May 27, 1971)

Before GEWIN, BELL and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

Adm. Office, U.S. Courts–Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1030

D. C. Docket No. CA 5958-70-T

CLAUDE D. BALLEW, ET AL.,
Petitioners-Appellants,

versus

JAMES A. ROBINSON, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before GEWIN, BELL and MORGAN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioners-appellants pay to respondents-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1971

Issued as Mandate: JUNE 18, 1971

APPENDIX C.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminai prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

An Ordinance Amending Ordinance No. 36-022 Adopted March 29, 1966 and Entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and Its Police Jurisdiction."

(41-183, 1969)

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that Sub-section (a) of Section 1, and Section 2 of Ordinance No. 36-022 adopted March 29, 1966 and entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and its Police Jurisdiction," are hereby amended to read as follows:

Section 1. (a) A thing is "obscene" if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

Section 2. Every person who knowingly prepares, sells, exhibits or commercially distributes or gives away or offers to give away or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene, printed or written matter or material, shall be guilty of an offense against the City of Mobile and shall be punished as hereinafter provided.

BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that Section 3 and Section 5 of Ordinance No. 36-022 adopted March 29, 1966, and entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and Its Police Jurisdiction", are hereby deleted from said ordinance.

Section 3. This ordinance shall be effective on the date of its adoption and shall remain in full force and effect and apply to each calendar year thereafter from year to year.

Section 4. Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

Adopted: NOVEMBER 18, 1969

/s/ Helen B. Danner,
Acting City Clerk

An Ordinance Further Amending Section One of the License Code of the City of Mobile, Alabama, Said License Code Being Duly Adopted on December 21, 1954

(34-182, 1969)

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that the License Code of the City of Mobile for the year 1955 and each succeeding year, said License Code being duly adopted on December 21, 1954, to be effective on January 1, 1955, and each year thereafter, is hereby further amended by changing a subsection of Section One of the License Code in the following particulars:

SECTION ONE: The paragraph numbered four hundred fourteen and entitled "Vending Machines" is hereby amended by adding Paragraph H thereto to read as follows:

414 . . .

(h) Regardless of the size of coin used where a machine is provided and/or offered for use by person or persons for looking at movie and/or panorama film, an annual license determined at a weekly base rate of $12.00 per machine.

SECTION TWO: This ordinance shall be effective on the date of its adoption and shall remain in full force and effect and apply to each calendar year thereafter from year to year.

SECTION THREE: Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

Adopted: NOVEMBER 18, 1969

/s/ Helen B. Danner,
Acting City Clerk

Title 7, § 1091 *et seq.*, Alabama Statutes

§ 1091. (9280) **Definitions.** – For the purpose of this article the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

§ 1092. (9281) **Maintaining nuisance; definition of.** – Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed in or in control of any such nuisance by any such owner, agent or lessee, shall for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. (9282) **Injunction of nuisance.** – Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

§ 1094. (9283) **When injunction issued before hearing.** – No injunction or restraining order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. (9284) **Complaint, filing of; temporary injunction** – Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of the pendency of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

§ 1096. (9285) **Restraining order, inventory of property**. – Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. (9286) **Contempt of court, what constitutes.** – Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

Sec. 23-9. Coin and slot machines to be licensed.[8]

It shall be unlawful and an offense against the city for any person to have in his possession or under his control any machine of any kind or nature whatsoever which is operated or played by depositing a coin or slug in a slot, unless a license for the possession and operation of such machine has been duly issued by the city and unless such license so issued is firmly pasted to the exterior of the machine where it can be plainly seen by an inspecting officer. The license may be pasted on the rear of the machine so that it will not mar the appearance thereof, if the machine is so located that it can be moved by an inspecting officer and the back thereof examined. (Code 1955, § 22-9.)

§ 1098. (9287) **Service of complaint, when writ granted.** – A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919 p. 52.)

§ 1099. (9288) **Answer of respondents.** – Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ **1100.** (9289) **Final decree, when granted.** – If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decree restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ **1101.** (9290) **Closing of premises, pending final decision.** – If on the hearing for a temporary injunction, it further appear that the person owning, in control, or in charge of the nuisance so enjoined has received five days notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purposes until the final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided is already issued, or if not issued, shall include such an order restraining, for such period, the removal or interference with the personal property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919 p. 52.)

§ **1102.** (9291) **Release of property on bond.** – The owner or owners of any real property or personal property so closed or restrained, or to be closed or restrained, may appear at any time between the filing of the complaint and the hearing of the application for a permanent injunction and, upon payment of all costs incurred, and upon the filing of a bond payable to the state by the owner of the real property, with sureties, or a surety company, to be approved by the register, in the full value of the property to be ascertained by the court, or the judge, conditioned that such owner or owners will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge shall have been rendered on the application for a permanent injunction, then, in that case, the court or judge, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance, and that with reasonable care and diligence such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and cancel or refrain from issuing at the time of the hearing on the application for the injunction as the case may be, any order or orders closing such real property or restraining the removal or interference with such personal property. The release of any personal property or real property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected by law. (1919, p. 52.)

§ 1103. (9292) **Trial of action; evidence; judgment.** – The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiesence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at the place complained of and the respondents from maintaining such nuisance elsewhwere in the county. (1919, p. 52.)

§ **1104.** (9293) **Abatement of nuisance; sale of property.** – If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in the circuit court, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in sections 1095-1102 of this title, and shall direct the sale of such thereof as belonged to the respondents notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property as provided in section 1102 of this title, or if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and so keeping it closed for a period of one year unless sooner released; but the owner of the place so closed and not released under bond as hereinbefore provided may now appear and obtain such release in the manner and upon fulfilling the requirements as hereinbefore provided. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, p. 52.)

§ 1105. (9294) **Claims for goods and property unsold.** – Owners of unsold property and contents so seized must appear and claim same within ten days after such order of abatement is made and prove innocence to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place. If such innocence be so established, such unsold personal property and contents shall be delivered to the owner; otherwise, it shall be sold as hereinbefore provided. If any person shall break and enter or use a place so directed to be closed, he shall be punished for contempt as provided hereinafter. (1919, p. 52.)

§ 1106. (9295) **Fees of officers selling property, etc.** – For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying and selling like property on execution; and for closing the place and keeping it closed, a reasonable fee shall be allowed by the court. (1919, p. 52.)

§ 1107. (9296) Nuisance established in criminal action; proceedings under this article. – In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. (9297) **Contempt proceedings for violation of closing order.** – In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

Title 37, § 505, Alabama Statutes

§ 505. (2034) (1278) **Abating nuisances.** – All cities and towns of this state shall have the power to prevent injury or annoyances from anything dangerous or offensive, or unwholesome and to cause all nuisances to be abated and assess the cost of abating the same against the person creating or maintaining the same.

Title 37, § 506, Alabama Statutes

§ 506. (2055) **Enjoining public nuisance.** – Municipalities may maintain a bill of equity to enjoin and abate any public nuisance, injurious to the health, morals, comfort or welfare of the community, or any portion thereof. (1919, p. 50.)

Title 14, § 373, Alabama Statutes

§ 373. (5014) (7428) (5600) (4030) **Introducing, advertising, or selling obscene literature.** – Any person who brings, or causes to be brought into this state for sale, or advertises, or prints, or sells, or offers to sell, or receives subscription for any indecent or obscene book, pamphlet print, picture, or paper, shall, on conviction, be fined not less than fifty nor more than one thousand dollars.

Title 37, § 759, Alabama Statutes

§ 759. (2172) **Liens for license or privilege tax.** – On all property, both real and personal, used in any exhibition, trade, business, vocation, occupation, or profession, for which a license is or may be required, municipal corporations shall have a lien for such license, which lien shall attach as of the date the license is due and shall be superior to all other liens, except the lien of the state, county and municipal corporations for taxes, and the lien of the state and county for license. Such lien may be enforced by attachment or in equity. (1919, p. 97.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-292

CLAUDE D. BALLEW and ROBERT MITCHUM, d/b/a MOBILE BOOK MART and CINE-MATICS, INC., a Body Corporate of the State of Alabama,
Petitioners,

v.

JAMES A. ROBINSON, in His Capacity as Chief, City of Mobile Police Dept., WILLIAM H. BRIGHAM, in His Capacity as City Attorney for the City of Mobile, JOE A. BAILEY, in His Capacity as Mayor in the City of Mobile, LT. JOE ROMAGNANO, as Officer in Charge of Vice Squad, City of Mobile Police Dept., and in Their Capacity as Members of the Board of Commissioners of the City of Mobile, City Hall: JOE A. BAILEY, LAMBERT C. MIMS and ROBERT B. DOYLE, JR.,
Respondents.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

MOTION TO DISMISS

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IN THE

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v.

JAMES A. ROBINSON, in His Capacity as Chief, City of Mobile Police Dept., WILLIAM H. BRIGHAM, in His Capacity as City Attorney for the City of Mobile, JOE A. BAILEY, in His Capacity as Mayor in the City of Mobile, LT. JOE ROMAGNANO, as Officer in Charge of Vice Squad, City of Mobile Police Dept., and in Their Capacity as Members of the Board of Commissioners of the City of Mobile, City Hall: JOE A. BAILEY, LAMBERT C. MIMS and ROBERT B. DOYLE, JR.,
Respondents.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

MOTION TO DISMISS

Respondents move this Court to dismiss the petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the ground that the granting of the Writ is not within the jurisdiction of this Court, because not taken in conformity to the rules of this Court; and, the relief sought, being that of federal court intervention by injunctive or declaratory action concerning pending State actions, is not supported by a showing in the record of great and immediate irreparable injury, combined with bad faith harassment, and is not absent counterbalancing equities in favor of the Respondents herein.

ARGUMENT

Apparently Petitioners in this cause have intentionally failed to comply with the first requisite of a Jurisdictional Statement under the Rules of this Court, Rule 15, Revised Rules of the Supreme Court of the United States, 1(a). Rule 15, subparagraph 1(a), requires that subparagraph (h) be complied with, by appending to the Jurisdictional Statement the Findings of Fact and Conclusions of Law of the District Court made after hearing in this cause.

By so failing to enlighten this Court with the facts, which were proven at hearing, the Petitioners are attempting to involve the Court in the fictional world first foisted on the City of Mobile, Alabama, and then upon the United States District Court for the Southern District of Alabama, and then upon the United States Court of Appeals for the Fifth Circuit. Taken as truth, the Petitioners' fictions are arresting; but no more arresting than the facts actually proven show the attempted deceit of the Petitioners to be.

The Findings of Fact and Conclusions of Law of the District Court are attached hereto as Appendix "A," since Petitioners did not see fit so to do.

Excerpted here are portions of said Findings and Conclusions, to show the diametrically opposing positions of the facts as proven, and the allegations and misstatements of the Petitioners herein in their "Opinions Below" (p. 2), "Statement of the Case" (p. 4-8), and "Conclusion" (p. 48), of their Petition for Writ of Certiorari.

U. S. District Court for the Southern
District of Alabama

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted. Filed Oct. 16, 1970)

Introduction

The evidence upon hearing for preliminary injunction in this cause showed the following to be the facts concerning the business and those responsible for the business at 12 South Conception Street, Mobile, Alabama, during the months of October and November, 1969, and from April, 1970 to the date of the hearing, May 22, 1970.

In early October, 1969, a bookstore was owned, opened and licensed by Robert Mitchum, apparently a non-resident of Alabama, and not a party to this action as filed or at the time of the hearing. Vending machines were moved into the store and applications were made for a license for the vending machines by various interests from out of the state of Alabama, the interests refusing to reveal their identity when making such applications. Licenses, alleged in the complaint to have been applied for by Cine-Matics, Inc., a body corporate of the State of Alabama, could not have been issued lawfully as there was no such corporation, nor was there any of the same name qualified to do business in Alabama to whom licenses could have been issued. The vending machines were put into operation without licenses having been obtained, by any agent of the out-of-state interests, which after a hearing, resulted in the license for the bookstore of Robert Mitchum being revoked by the City of Mobile.

During the November operating time purchases were made by the City of the materials in the store of Robert

Mitchum which subsequently led to a single arrest of one of Robert Mitchum's employees on a charge of selling obscene material and to an injunction suit for operating a business of selling obscene materials. The latter action was against the actual owner of the store, who is Robert Mitchum (not a party to this action as filed or at the time of the hearing).

From these facts, essentially, this litigation arose. It was brought in the name of the one employee of Robert Mitchum, who was arrested, Claude Ballew, and in the name of a corporation which did not exist at the time of any of the occurrences alleged in the complaint concerning the corporation; nor was there a corporation of the same name as petitioner, doing business in Alabama which could effectively, and lawfully, transfer any rights to a subsequent corporation styled as is the corporate-petitioner in this action.

Ballew seeks relief from the one charge of selling obscene material and the one arrest for operating vending machines without a license therefor. The latter charge is alleged, by the complainants under oath, to have arisen due to the City wrongfully having refused to issue licenses (to a non-existent corporate owner), [illegible], Inc. which did not exist and which offered no proof of the manner in which it could have acquired in law the rights claimed to belong to it as alleged in the complaint, seeks relief from the actions taken by the City which were based upon the vending machines being admittedly operated without licenses.

By reason of facts found and the legal conclusions reached, all as hereinafter set forth, I am of the opinion that a decree should be entered denying the preliminary injunctive relief sought by petitioners and finding that the City ordinances and licensing procedures and state laws attacked as unconstitutional or unconstitutionally-applied are neither. In connection with the foregoing, I enter the following findings of fact and arrive at the following conclusions of law:

1

On October 8, 1969, a bookstore at 12 South Conception Street, Mobile, Alabama, was opened by, stocked by, licensed with business license to and supplied with employees by Robert Mitchum, reputedly of Atlanta, Georgia. The City of Mobile issued a license to Robert Mitchum as the owner of the store. Paragraphs (2) through (6), below, set out involvements concerning licenses for vending machines and the bookstore which the evidence shows in no manner, ultimately, involved the issue of obscenity.

2

During October, 1969, an application for licenses for vending machines was made to the Revenue Department of the City of Mobile and referred to the Police Department, the licenses to be for "Robert Mitchum", of Atlanta, Georgia. The undisputed testimony is that the agents of Robert Mitchum refused to give information sufficient to allow an investigation into the identity and possible criminal record of the purported owner at that time, Robert Mitchum. During this time, the City was without knowledge of the true nature of the vending machines, and consequently did not issue licenses for what could have been gambling machines or some game of chance, as far as is shown by any evidence before me at this time. The bookstore operated during the month of October with no further inter-action of the City or the owner-licensee, Robert Mitchum.

3

During the first week of November, 1969, Robert Mitchum, the store owner and licensee, had, or allowed, vending machines moved into the bookstore purportedly to show movies. The Legal Department of the City of Mobile was advised at this time by the Police Department of·the refusal of Robert Mitchum as the owner of the store, and as the intended licensee for the vending machines, to divulge information sufficient to allow an investigation of his background and possible criminal record. Shortly thereafter the Revenue Department of the City of Mobile received a letter from Joe Fine, Attorney of Russellville, Alabama, for "Cine-Matics, Inc.", to which letter was attached a check offered in payment of licenses for the vending machines "owned" by "Cine-Matics, Inc."

"Cine-Matics, Inc.," an Alabama body corporate, petitioner here, was not in existence during or prior to November, 1969. However, the City was not aware that such was the case, nor was the City aware that no corporation, "Cine-Matics, Inc.," or any of very similar name, whether an Alabama or foreign corporation, was qualified to do business in Alabama during or prior to November, 1969.

4

On or about November 10, 1969, the Legal Department was visited by Attorney Fine, who was in Mobile seeking to have licenses issued for the vending machines which purportedly showed movies, in the name of a corporation styled "Cine-Matics, Inc." The City Attorney, William H. Brigham, advised that the City must know who was to be held responsible for the operation of vending machines for which licenses were sought, and therefore investigation forms would be forwarded to Attorney Fine with an accompanying letter explaining the information desired by the City. The forms were sent, with letter, on November 13, 1969. **There is no doubt that the forms were never returned, the true owner, whomever he or it may be, thereby refusing to divulge the information rea-**

sonably necessary for the welfare of the citizens of the City, State and the "other 49 states". (Emphasis added.)

On approximately November 14, 1969, the true owner of the vending machines having refused to divulge information concerning any corporation qualified to do business in Alabama or a suitable individual to whom licenses could be issued for the vending machines, commenced operating the vending machines without licenses. It is here noted that the complaint admits that petitioner Ballew operated the vending machines. on advice of counsel, without licenses for the vending machines. The proof is undisputed that there was no corporation to whom licenses could have lawfully been issued as none was qualified to do business with a name as alleged for the corporate petitioner. The same "counsel" who advised Ballew to operate the vending machines without licenses was aware of this state of facts.

5

On November 18, 1969, the City of Mobile License Code was amended to make definite the amount required for vending machines which showed movies, an annual rate being established therefor. The proof at the hearing showed that the annual license rate was considerably below some rates presently being collected by the City according to the undisputed evidence.

Also on November 18, 1969, an employee of the store, Claude Ballew, as agent of the owner of the vending machines who would not divulge sufficient information to allow determination of a police record, or as agent of a corporation (which, unknown to the City, was not qualified to do business in Alabama), was served notice that the licenses for the vending machines should be paid by whomever was responsible for the vending machines being operated without licenses in the bookstore licensed to Robert Mitchum.

On November 20, 1969, the License Department Investigator, Seale, determined that the vending machines were still being operated without licenses and therefore obtained a warrant for the arrest of Claude Ballew, as the agent of the owner of the bookstore and the owner of the vending machines who allowed the machines to be operated without a license. Claude Ballew was arrested on this charge.

On November 20, 1969, a civil suit was filed against Cine-Matics, Inc., as the owner, or whatever entity was the owner, of the vending machines being operated without licenses, for the money owed on the licenses. As the owner was unknown and apparently a non-resident of the State of Alabama, the only property in Alabama known to be owned by the true owner, the vending machines, was attached to satisfy whatever judgment might be forthcoming under this civil action for money owed. The owner of the vending machines has, as far as any evidence presented shows, refused to demand the return of the machines, and has also **voluntarily** chosen not to obtain possession by following procedures allowed by law in attachment suits. Title 7, Section 876, Code of Alabama.

6

On November 25, 1969, at the next City Board of Commissioner's meeting, the bookstore license was conditionally revoked due to the owner of the bookstore, Robert Mitchum, operating or allowing the operation of unlicensed vending machines in his store, after notice, and contrary to the law of the State of Alabama, as well as the City of Mobile. Title 37, Section 754, Code of Alabama. Notice of a hearing to show cause why the conditional revocation should not be made final was served on the agent of the licensee of the store and on the attorneys for the same, the hearing to be held two weeks subsequent to the conditional revocation.

On December 9, 1969, the hearing on the show cause procedure under the license code of the City of Mobile was held at the regular meeting of the Board of Commissioners. Robert Mitchum was represented by counsel John Coleman of the Mobile bar. The only testimony given at the hearing by any party, which was uncontradicted and which was not denied, was that after notice of license being required and due, the vending machines were operated at the bookstore of Robert Mitchum and were not licensed at the time.

At the time of this "show cause" hearing there had been no conviction on the basis of a violation of the City of Mobile's obscenity ordinance. Apparently as a consequence of this situation, there was no testimony, whatsoever, given at the license revocation hearing concerning any violation of the obscenity ordinance upon which a license revocation could be founded.

Consequently, on the basis, and only on the basis, that the bookstore was operated in contravention of the laws of the State of Alabama and the City of Mobile by operating vending machines without licenses, the revocation of the bookstore license of Robert Mitchum was made final by the Board of Commissioners on December 9, 1969.

On May 18, 1970, a civil action in State Court for money owed by Robert Mitchum or the true owner if other than Robert Mitchum, as actual owner of the vending machines for which license fees were due, was filed. This action was filed after the City became fully aware that there was no corporation qualified to do business in Alabama, domestic or foreign, with a styling similar to "Cine-Matics, Inc.", at the time when the vending machines had been operated previously, and at the time when the previous civil action brought against "Cine-Matics, Inc." had been filed. Attachment in aid of suit against Robert Mitchum was made on the materials in the store, since this was the only property known as supposed to be owned by non-resident Robert Mitchum. This was done in order that the judgment against this non-resident might be satisfied, if and when obtained. There was no proof that Robert Mitchum thereafter sought the return to his possession of these materials by the process of law provided him, or the true owner if other than him. Title 7, Section 876, Code of Alabama.

7

The facts concerning the operation of Robert Mitchum's store in violation of the obscenity ordinance of the City of Mobile as shown at the hearing for preliminary injunction were as follows:

On November 17, 1969, representatives of the City of Mobile bought samples of the various merchandise sold in the store of Robert Mitchum including newspapers, magazines, books and movie film. On November 20, 1969, officers of the Mobile Police Department bought one book from employee Claude Ballew, which book was taken by the officers to the Judge of the City Municipal Court. The Judge examined the book completely and then signed a warrant for the arrest of Claude Ballew for selling the book in violation of the obscenity ordinance of the City of Mobile.

On November 20, 1969, suit was filed by the City seeking an injunction against the operation of the bookstore of Robert Mitchum in violation of the obscenity ordinance of the City of Mobile, the defendants in the injunction suit being served and notice given to the Attorneys for the defendants, John Coleman and Robert Smith. On November 21, 1969 a motion for instanter relief in the injunction action was filed by the City of Mobile and on the basis of affidavits submitted to the Court by citizens of the City of Mobile including the President of Downtown Mobile Unlimited and the Executive Secretary of Downtown Mobile Unlimited, the injunction was issued on this date. The defendants totally failed to appear, file an answer, or request for hearing or any other pleading at any time whatsoever in this case. Consequently a decree pro confesso was entered more than five months later by the State Court (Judge McRae).

On December 12, 1969, Claude Ballew, the employee of Robert Mitchum at the bookstore, was convicted in the Mobile Municipal Court on a single charge of selling a book in violation of the obscenity ordinance, and one charge of operating vending machines without licenses therefor. These cases were appealed to the Circuit Court of Mobile County, State of Alabama, by defendant and are pending therein.

As against the complaint allegations that petitioners are being crushed by delayed vindication of their First Amendment rights, it has not been disputed that plaintiffs have acquiesced for months and months in the postponement of the pending state criminal proceedings. They have neglected during all this time to press for their right to speedy state adjudications or even to press to raise in the state courts the issues of constitutional law they want this court to decide.

Conclusions of Law

8

It was conclusively proven that the Alabama corporation named as one of the petitioners in this proceeding did not even exist at the time the matters alleged in the complaint were alleged to have in fact occurred to, and been the concern of, this "corporate" petitioner and from which it allegedly suffered multitudinous constitutional oppressions. Therefore, the Alabama corporation has no standing to complain of the matters alleged. There was no proof of the existence of a foreign corporation by the name of Cine-Matics, Inc. But even if there were such a foreign corporation, such foreign corporation was not entitled to do business in the State of Alabama of the nature alleged in the complaint as it was conclusively proven that no such foreign corporation had ever qualified to do business in Alabama. Therefore, no foreign corporation, if it exists, could have been lawfully issued licenses by the City of Mobile. Any business done by a foreign corporation in Mobile of the nature alleged in the complaint was illegal and violated state law. **Code of Alabama,** Title 10, Section 21(89) et seq.; **Constitution of Alabama,** Article 12, Section 232. Any business done by agents or employees of Cine-Matics, Inc. was a violation of State law. Therefore, the corporate petitioner cannot be the real party in interest, if there is such, entitled to relief of some nature in this action, for all the wrongs allegedly done to this corporate petitioner. (See Paragraph 20, infra.)

Robert Mitchum was not a party to this action when filed or upon hearing. He is, apparently, the real party in interest so far as the business and license of "Mobile Book Mart" are concerned. Claude Ballew is not the real party in interest as to these matters, he being merely an employee of Robert Mitchum. Rule 17 (a) of the Federal Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest . . .".

Robert Mitchum, on hearing was shown to be the prime instigator of the complaint in this case. The complaint claims wrongs to a non-existent corporation and wrongs to the license and business interests alleged in the complaint to belong to one shown by the evidence to be a mere employee. Mitchum, by counsel, after the evidence showed his design, sought to amend under Rule 17 (a) and become a party thereunder as the real party in interest. Transcript p. 89. This Court granted the motion to amend in five days, as sought by Mitchum. Mitchum, following his pattern, filed an amendment weeks later based on Rule 19. He alleged that this Court had allowed him do so.

It is difficult to find that Robert Mitchum comes into this Court with clean hands.

9

Claude Ballew is a real party in interest and does have standing to complain concerning the two arrests made against him. However, these matters are now pending on appeal for trial in the State Court and would appear to be classic examples of those state actions which are prohibited from being enjoined because of the provisions of United States Code, Title 28, Section 2283; vix, the facts of these cases are not within an exception of this injunction statute.

As pointed out above, Cine-Matics, Inc., had no licenses for the operating of the vending machines alleged in the complaint to belong to the corporation, and could not have validly acquired or held licenses. Any act done by Ballew in furtherance of the illegal activities of Cine-Matics, Inc., i. e. operating the vending machines allegedly owned by "Cine-Matics, Inc., an Alabama body corporate" was also illegal. No other person or entity bought the licenses. The arrest for operating the machines without licenses must stand.

* * * * * * *

See Appendix "A" for full "Conclusions of Law."

From the quoted portion of the District Court Findings of Fact and Conclusions of Law it is evident that the actions of the Respondents complained of by Petitioners arose under separate courses of action followed by Petitioners. Primarily petitioners entered into a fraudulent design or scheme to acquire licenses for vending machines without identifying the entity (actually, nonentity) or person (possibly, criminal) who would be responsible. The evasion of the statute (Code of Alabama, Title 37, Sec 715) requiring the governing body of the cities to know who is being licensed brought on multiple easily foreseen consequences, under other statutes, but which petitioners hope to evade in one fell swoop in the Federal Court System by claiming unconstitutionality of the evaded statute.

Secondarily, two actions were brought by respondents on the basis of petitioners selling obscene material, i.e., one arrest, and an injunction suit to abate a nuisance. These are clearly not due consideration in Federal Courts at this state due to 28 USC 2283 and recent U. S. Supreme Court holdings. **Younger v. Harris,** 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746, Samuels v. Mackell, 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. 764, Dyson v. Stein, ... U.S. ..., 27 L. Ed 2d 701, 91 S. Ct. ..., Byrne v. Karalexis, ... U.S. ..., 27 L. Ed. 2d 792, 91 S. Ct. ..., Boyle v. Landry, 401 U.S. 77, 27 L. Ed. 2d 696, 91 S. Ct. 758, Perez v. Ledesma, ... U.S. ..., 27 L. Ed. 2d 701, 91 S. Ct. ..., (All 1971); Atlantic Coast Line v. the Brotherhood, 398 U.S. 281, 90 S. Ct. 1798, 26 L. Ed. 2d 234 (June, 1970).

Petitioners' "Reasons for Granting the Writ" can most advantageously be answered in reverse order since such a review of the facts of the case and applicable law will show most clearly that under applicable holdings of this Court, there is no plausible grounds to grant the Writ.

Respondents have not been notified that any portion of the record in this cause has been requested to be certified by Petitioners, as required by Rule 12, Supreme Court Rules. On Page 47 of Petitioners' brief herein is found a citation to (T.183), which is a citation to the

Appendix filed by Petitioners to the Fifth Circuit Court of Appeals. Respondents' citations hereinafter will be to said Appendix.

I (III)

Petitioners contend:

> **"The Licensing Ordinance in Question as It Purports to Regulate the Commercial Exercise to First Amendment Freedoms Is Unconstitutional."**

Respondents contend

> **A Claim of Unconstitutionality Will Not Be Heard to Excuse the Consequences of a Voluntary, Deliberate and Calculated Course of Fraud and Deceit by One Who Elects Such a Course as a Means of Self Help, and Attempts to Escape the Consequences by Urging That His Conduct Be Excused Because the Statute Which He Sought to Evade Is Unconstitutional, But Which Evaded Statute Is Not the Statute From the Consequences of Which He Seeks to Be Relieved.**

While peaceably operating a bookstore, and applying for vending machine licenses, petitioners SOUGHT TO EVADE the application of Code of Alabama, Title 37, Section 751, by the City of Mobile:

> "Theatres, tenpins, shooting galleries, etc. Any city or town shall have the power to license, tax, regulate, restrain, or prohibit theatrical and other amusements, billiard and pool tables, nine or tenpin alleys, box or ball alleys, shooting galleries, theatres, parks and other places of amusement when in the opinion of the council the public good or safety demands it, to refuse to license any or all such business and to authorize the mayor by proclamation to cause any or all houses or places of amusement, or houses

> or places for the sale of firearms or other deadly weapons, to be closed for a period of not longer than the next meeting of the city or town council." Title 37, Section 751.

Under the statute, cities in Alabama are responsible for those parties offering entertainment as well as the types of entertainment allowed in the respective cities. It is the duty of the council or City Commission as the case may be, to investigate and determine if the entertainment, or those who may masquerade under the guise of offering some stated type, to be offered may be such as will be harmful to the public health, safety or welfare.

Since "vending" machines are often connected with gambling devices or games of chance, the Revenue Department of the City of Mobile, with the aid of the Police Department when investigating out of town or out-of-state, follows a standard procedure in each and every application for vending machine licenses of requesting sufficient information to identify the party or entity to be responsible for the machines.

In this action, if those allegations of the complaint (and tracted in the brief) (Appx. P. 15-16; Pet. brief, p. 5) to the effect that all information sought by the City was furnished by the petitioners as to the parties responsible for the operation of the vending machines, there would be an entirely different posture to this action—an abatement of a nuisance action, and a single arrest for selling obscene literature would be the sole issue.

As set out in the statement of facts, the letter of the City Attorney with forms, concerning [illegible], Inc. (Appx. pp. 121-124), sent to petitioner's Attorney Joe Fine was never answered. IT COULD NOT BE. There was no such corporation in November, [illegible], qualified to provide the answers requested. And at no place in the record, and especially not in the evidence put on at the hearing, is the identity (by birthdate) of "Robert Mitchum" as the first proposed licensee of the vending machines shown to have been given to the City.

Since petitioners could not, or would not, provide the full details concerning vending machine prospective licensees, the petitioners decided to evade the City's Sec. 751 inquiries, operate vending machines without obtaining licenses, brazen out the consequences, and rely on condemning as unconstitutional the law (Sec. 751), although the consequences to be suffered would be from the application of unrelated statutes and ordinances brought into play only due to the original evasion of Section 751, Title 37.

The consequences risked by operating the vending machines without licenses were not difficult to foresee:

1. Money for the operating of the machines would be due from someone; with attendant attachment possibilities to cover a judgment (especially true when dealing with out-of-state unidentifiable owners).

2. Operating a business function without a license is validly subject to a criminal action.

3. Performing a criminal business function (as in (2)) in the process of operating an otherwise validly licensed and operating business, would subject the validly obtained business license to revocation possibilities under Sec. 30 of the City License Code (Appx. p. 273).

Each of the possible consequences occurred to Petitioners. Can one or any of the petitioners be heard to claim relief based on the unconstitutionality of the statute (Title 37, Section 751) evaded deliberately and fraudulently, although the damages they claim to have suffered are not from a prosecution or application of Title 37, Section 751, Code of Alabama?

The U. S. Supreme Court has ruled as to such a claim for relief based on unconstitutionality of the evaded statute, which is not the statute or statutes under which conseqences are suffered that the defrauder seeks to escape. The Court stated the law to be:

> "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's (consequences of) fraud. It is not an action to enforce the statute claimed to be unconstitutional" (Parenthesis added). **Bryson v. United States**, 396 US 64, 24 L. Ed. 2d 264, 90 S.Ct. 355 (1968).

Bryson v. United States is a criminal action. The convicted criminal was not allowed to attempt to rely on the unconstitutionality of a fraudulently evaded statute as grounds to excuse action for the consequences of the fraudulent evasion. We, in the instant case, are not dealing entirely with criminals, or criminal actions. But for any non-criminals, and for the non-criminal actions sought to be set aside, equitable principles are clearly to be considered before relief can be allowed in the lower Federal Court system. **Younger v. Harris**, 39 L.W. 4201; **Samuels v. Mackell**, 39 L.W. 4211. Certainly the governing principle disallowing a claim of unconstitutionality to be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit with unhappy consequences, if it applies to a man in jail, must apply to a party seeking the aid of equity, where the party has bottomed his actions on deceit.

In the instant action, petitioners attempted to deceive the City into issuing vending machine licenses to a non-existent corporation. When asked by the City for relevant information of the corporation before licenses would be issued, under § 751, Title 37, petitioners claimed "counsel" advised:

> ". . . a person faced with such an unconstitutional licensing law may ignore it, and engage with impunity in the exercise of the right of free expression for which the law purports to require a license" (**Shuttlesworth v. City of Birmingham**, 89 S.Ct. 935) (Appx. p. 16).

The whole scheme is a sham—at no place in the record is there evidence of an attorney who would so advise petitioners UNDER THE FACTS OF THIS CASE. And the petitioners suffered the consequences.

But this court, sitting in equity, clearly will not relieve petitioners of the burdens of the consequences. **Bryson v. United States**, *supra.*

> ". . . it cannot be thought as a general rule of our law a citizen has a privilege to answer fraudulently a question (even if) the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood." **Bryson v. U. S.**, *supra*, 24 L. Ed. 2d at 271 (parenthesis added).

II

Petitioners Seeking Federal Court Intervention by Injunctive or Declaratory Relief of Pending State Procedures Must Show Great and Immediate Irreparable Injury, Combined With Bad Faith Harrassment, With No Counterbalancing Equities, Before the Federal District Court Should Assume Jurisdiction.

Following the hearing in the District Court in this cause in May of 1970, there have been announced two basic clarifications of the proper relationship between:

a) proceedings in state functions and courts; and

b) the supposed necessary assumption by the Federal court system of jurisdiction for injunctive and declaratory relief of claimed unconstitutional state statutes, or unconstitutional state actions under state statutes.

First in time was **Atlantic Coastline v. Brotherhood of Locomotive Engineers**, 398 U.S. 281, 90 S.Ct. 1789, 26 L.Ed. 2d 234 (June, 1970). This decision interpreted 28 U.S.C., 2283, the anti-injunction statute as applied to state court injunctive proceedings.

On February 23, 1971, the U. S. Supreme Court delivered opinions of **Younger v. Harris**, supra, **Samuels v. Mackell**, supra, **Dyson v. Stein**, supra, **Bryne v. Karalexis**, supra, and **Boyle v. Landry**, supra. These opinions covered "Our Federalism" and it might be surmised, seem to relieve the lower Federal Court system of the heavy burden assumed on the basis of **Dombrowski v. Pfister**, 380 U.S. 479 (1965), concerning state proceedings or statutes claimed unconstitutional.

Without presuming on the Court's time by quoting at length from and attempting to interpret this Court's February 23, 1971 holdings, the basic holdings may be:

1. Federal Courts should not grant injunctive relief against State proceedings claimed unconstitutional unless GREAT AND IMMEDIATE irreparable injury is evident from the showing made by petitioners. Younger v. Harris, *supra;* Perez v. Ledesma, *supra.*

2. Declaratory relief, which is often nearly impossible to separate in effect from injunctive relief, similarly should not be granted as to state proceedings claimed unconstitutional unless Great and Immediate irreparable injury is evidence from the showing made by Petitioners. Samuel v. Mackell, *supra;* Perez v. Ledesma, *supra;* Younger v. Harris, *supra.*

Relating these tests, which seem to be combined with a need to show bad faith, and harrassment on the part of the state, Younger v. Harris, *supra,* to the facts in the instant record seems to uphold the District Court's denial of relief.

As to Great and Immediate irreparable damages, the Petitioners firstly could have avoided all the licensing involvements by either furnishing the requested information as to prospective vending machine licensees, and paying the license; or alternatively, filed a Bill for Declaratory Judgment in the State Court, seeking a temporary restraining order on the actions of the City concerning requests for information or setting of claimed high license fees; or, paid under protest and in conjunction with filing a Bill for Declaratory Judgment; or, not operated the vending machines until state recourse had been sought in court, and denied. None of these were done.

But instead, petitioners seemed to be the parties exhibiting bad faith, by fraudulently acting as shown by the record, and hoping to have Federal Court relief from the consequences of their attempted deceit.

The numerous consequences of petitioners' apparent "poor advice of counsel" cannot now be termed harrassment, since petitioners could foresee the consequential results of their fictitious corporate offering to acquire the licenses followed by operating the machines without licenses.

Most convincing of all, however, is the REOPENING **of the bookstore immediately after filing of the federal action, with no city bookstore license; no reply or appearance in the abatement of a nuisance action, and under a writ of injunction completely ignored; and no attempt to vindicate in either criminal action in the state courts all of the claimed constitutional oppressions** (Appx. pp. 145, 146, 242). Certainly petitioners could see NO Great and Immediate irreparable injury threatened by whatever actions the City had taken or that the petitioners could see the City could take in the future, judging by the petitioners' actions in reopening.

> "Moreover, the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. **Schneider v. State,** 308 U. S. 147 (1939); **Cantwell v. Connecticut,** 310 U.S. 296 (1940); **Mine Workers v. Illinois Bar Assn.,** 389 U.S. 217 (1967). Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important

> and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution."
>
> **Younger v. Harris**, 39 LW 4201, at 4205 (1971).

Inasmuch as the petitioners would be facing no more than a Bill to Abate a Nuisance, and a single arrest for selling obscene material, if they had not chosen to supply reasonable information on the prospective licensees (other than a non-entity), and refused to pay the license on vending machines under protest, or some alternative as set out, supra, it is relevant to set out one further quote of the February 23, Supreme Court holdings, dealing with Federal court declaratory action against alleged unconstitutional state taxing statutes and procedures.

As in the instant case,

> ". . . the lower courts had dismissed the complaint on the ground that the challenged law was constitutional. This Court affirmed the dismissal, 'but solely on the ground that, in the appropriate exercise of the court's discretion, **relief by way of declaratory judgment should have been denied without consideration of the merits.**' Id., at 301-302. The Court, in a unanimous opinion written by Mr. Chief Justice Stone, noted first that under long-settled principles of equity, the federal courts could not have enjoined the Louisiana official from collecting the state tax at issue there unless, as was not true in that case, there was no adequate remedy available in the courts of the State. This judicial doctrine had been approved by Congress in the then recent Tax Injunction Act of 1937, 50 Stat. 738, now U.S.C., § 1341. Although the declaratory judgment sought by the plaintiffs was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory

judgment was nevertheless 'essentially an equitable cause of action,' and was 'analogous to the equity jurisdiction in suits quia timet or for a decree quieting title.' 319 U.S., at 300. In addition, the legislative history of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, as amended, 28 U.S.C., § 2201, showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles. Accordingly the Court held that in an action for a declaratory judgment, 'the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds.' 319 U.S., at 300. The Court's application of these principles to the specific problem of declaratory judgments relating to the correction of state taxes is worth quoting in full, because it bears so directly on the problem before us in the present case:

> "The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.
>
> "It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that the procedure may in every practical sense operate to suspend collec-

> tion of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion **that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes,** *save in exceptional cases,* **require a like restraint in the use of the declaratory judgment procedure.**" 319 U.S., at 299. Samuels v. Mackell, 39 LW 4211. (Emphasis added.)

Under the above quoted law, certainly the instant case is not an "*exceptional case*", in petitioner's favor, at least. The District Court therefore was correct in denying all relief sought in regard to those several state (city) proceedings which were the consequences of the fraudulent attempt by Petitioners to have licenses issued to a fictitious (or at best unqualified and unlicensable) corporation, and the subsequent operation of vending machines supposedly based on "advice of counsel" that the licensing law (Title 37, Sec. 751) which allowed a refusal under such facts is "unconstitutional", i.e., those state court actions of suit for money owed for the licenses required for the operating vending machines, with resulting attachment of vending machines since no in-state entity was available to answer for the judgment; the single arrest for operating the machines without a license; and, the revocation of the book store license on the sole ground of operating the vending machines without licenses in the bookstore.

Therefore, the District Court did not err in denying all relief, although conceivable the lower court should merely have granted the motion to dismiss, under the February 23, 1971 cases.

III

Any Injunction Against State Court Proceedings Otherwise Proper Under General Equitable Principles Must Be Based on One of the Specific Statutory Exceptions to S 2283 if It Is to Be Upheld. Moreover Since the Statutory Prohibition Against Such Injunctions in Part Rests on the Fundamental Constitutional Independence of the States and Their Courts, the Exceptions Should Not Be Enlarged by Loose Statutory Construction. Proceedings in the State Courts Should Normally Be Allowed to Continue Unimpaired by Intervention of the Lower Federal Courts, With Relief From Error, if Any, Through the State Appellate Courts and Ultimately This Court.

A three judge court in the Fifth Circuit has interpreted the **Atlantic Coastline** 1970 holding (398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234) as it would seem to apply to the instant case. **Mitchum v. Foster**, 315 F. Supp. 1387 (1970), USDC, N.D. Fla. (Three Judge Court). In that case, a "Robert Mitchum" was the respondent in an Abatement of a Nuisance action in the Florida State Court. The three judge court held that 28 U.S.C. 2283 applied to the state court abatement of a nuisance equity proceeding based on the sale of obscene materials, with facts identical to the instant case, stating:

> "The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this Court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court.
>
> * * * * * * * *
>
> ". . . No amount of tortured reasoning by us will suffice to force the factual situation in this case as out-

> lined above into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283. Injunctive relief, either preliminary or permanent, is not available on these facts." Mitchum v. Foster, 315 F. Supp. 1387 (1970).

Certain it must be that 28 U.S.C. 2283 would be sufficient grounds by itself to justify the denial of injunctive relief by the District Court in the pending instant state court abatement of a nuisance action, if **Mitchum v. Foster**, *supra*, is a correct interpretation of Atlantic Coast Line.

IV (I)

Construction by the U. S. Supreme Court and State Supreme Courts Determine the Construction to Be Placed on Obscenity Ordinances.

If the issue of the facial constitutionality of the Mobile Obscenity Ordinance is reached, the following seems relevant. Petitioners' brief, page A. 6, sets out the amendment to the Mobile Obscenity Ordinance, section 1 of which is as follows:

> "Section 1. (a) A thing is 'obscene' if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated."

Suffice it to say, concerning the "presumption" question discoursed at great length in the brief of petitioners under proposition (I), for printed material to BE obscene, the U. S. Supreme Court has dictated that such material must be "utterly without redeeming social value"

Memoirs v. Mass., 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1 (1966). Therefore, before any court may determine that material is obscene, by virtue of the supremacy doctrine, such court must find that the material is utterly without redeeming social value.

Therefore, material which **is** obscene in law, must have been found utterly without redeeming social value, and so subject to stricture, as in the Mobile Obscenity Ordinance 36-022, as amended by Ordinance 41-183 (Appx. p. 78).

Parenthetically, the definition of "obscene" in the first sentence of Ordinance 41-183 must, under the supremacy doctrine, have read into it the "utterly without redeeming social value" element. See **Entertainment Ventures, Inc. v. Brewer,** 306 F. Supp. 801 (M.D. Ala.) (Three Judge Court), 1969; **The Great Speckled Bird v. Stynchcombe,** 289 F. Supp. 1291 (N.D. Ga. 1969). **Delta Book Dist., Inc. v. Cronvich,** 304 F. Supp. 66 (E.D. La. 1969).

SUMMARY

The actions of the Respondents complained of by the petitioners arose under separate courses of action followed by petitioners. Primarily, petitioners entered into a scheme or design to acquire licenses for vending machines without identifying the entity or person who would be responsible. Since Petitioner's scheme resulted in them not being able to identify the non-licensable entity proposed as licensee, they sought to evade the statute requiring cities to know who is being licensed, by simply operating the machines without obtaining or paying for licenses. This course of action brought on a suit for the money owed for operating the machines and attachment of the machines for this money due; an arrest for operating machines without a license; and, revocation of petitioner's bookstore license for operating the vending machines without licenses. Petitioners seek to evade all these consequential actions by claiming the right to evade Sec. 751, due to its unconstitutionality, in requiring the identity of a non-entity.

If petitioners could have proved Cine-Matics, Inc. existed to be licensed when licenses were sought, petitioners would most certainly have done so. Similarly, as to the claim in the sworn complaint, and then in brief (Appx. pp. 15-16, Pet. brief pp. 4-5) that the City was furnished the information it required, as to proposed licensees, petitioners would most certainly have offered proof, if it were possible. There is no such proof in the record, and that is the most significant **fact** of the record.

On equitable principles, alone, these petitioners should be granted no relief in this Honorable Court. **Younger v. Harris,** *supra*; **Samuels v. Mackell,** *supra.*

As to the consequences following a deceit, a claim of unconstitutionality will not be heard to excuse the consequences of a voluntary, deliberate and calculated course of fraud and deceit by one who elects such a course as a means of self help, and attempts to escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional where such evaded statute is not the statute from the consequences of which he seeks to be relieved. **Bryson v. United States,** 396 U.S. 64.

As further and additional grounds for the correctness of denying relief in Federal court for these petitioners, great and immediate irreparable injury is necessary before injunctive or declaratory relief should be considered. On Pages 21-22 of this brief are itemized numerous considerations showing the petitioners did not actually consider any great and immediate irreparable injury to have taken place; most significant being the reopening for business after filing this action. The only "ultimate censorship" seemed to be petitioner's own.

On Page 21 of the brief is the start of a list of alternatives petitioners could have resorted to, one or more of which would have been a plain, speedy and efficient remedy in the State court to contest the state (city) taxing procedure. Therefore, on the basis of **Samuels v. Mackell**, *supra*; **Great Lakes Co. v. Huffman**, 319 U.S. 293 (1943), and 28 USC 1341, the Tax Injunction section, these petitioners are due no relief from the consequential actions of the City.

Finally, aside from questioning the licensing procedures and consequences in a manner as called for by the cited authorities, i.e., resorting to state court, the actual state court proceedings here involved are subject to 28 USC 2283, which would seem to specifically exclude injunctive relief under these facts; **Atlantic Coast Line v. Brotherhood**, 398 U.S. 281 (1970); **Mitchum v. Foster**, 315 F. Supp. 1387 (1970), as well as the rational and holdings of **Younger v. Harris**; **Samuels v. Mackell**; **Perez v. Ledesma**, et al., 39 LW 4201 et seq.

Respectfully submitted

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APPENDIX A

United District Court for the Southern District
of Alabama

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted. Filed Oct. 16, 1970)

Introduction

The evidence upon hearing for preliminary injunction in this cause showed the following to be the facts concerning the business and those responsible for the business at 12 South Conception Street, Mobile, Alabama, during the months of October and November, 1969, and from April, 1970 to the date of the hearing, May 22, 1970.

In early October, 1969, a bookstore was owned, opened and licensed by Robert Mitchum, apparently a non-resident of Alabama, and not a party to this action as filed or at the time of the hearing. Vending machines were moved into the store and applications were made for a license for the vending machines by various interests from out of the state of Alabama, the interests refusing to reveal their identity when making such applications. Licenses, alleged in the complaint to have been applied for by Cine-Matics, Inc., a body corporate of the State of Alabama, could not have been issued lawfully as there was no such corporation, nor was there any of the same name qualified to do business in Alabama to whom licenses could have been issued. The vending machines were put into operation without licenses having been obtained, by any agent of the out-of-state interests, which after a hearing, resulted in the license for the bookstore of Robert Mitchum being revoked by the City of Mobile.

During the November operating time purchases were made by the City of the materials in the store of Robert Mitchum which subsequently led to a single arrest of one of Robert Mitchum's employees on a charge of selling obscene material and to an injunction suit for operating a business of selling obscene materials. The latter action was against the actual owner of the store, who is Robert Mitchum (not a party to this action as filed or at the time of the hearing).

From these facts, essentially, this litigation arose. It was brought in the name of the one employee of Robert Mitchum, who was arrested, Claude Ballew, and in the name of a corporation which did not exist at the time of any of the occurrences alleged in the complaint concerning the corporation; nor was there a corporation, of the same name as petitioner, doing business in Alabama which could effectively, and lawfully, transfer any rights to a subsequent corporation styled as is the corporate petitioner in this action.

Baliew seeks relief from the one charge of selling obscene material and the one arrest for operating vending machines without a license therefor. The latter charge is alleged, by the complainants under oath, to have arisen due to the City wrongfully having refused to issue licenses (to a non-existent corporate owner). Cine-Matics, Inc., which did not exist and which offered no proof of the manner in which it could have acquired in law the rights claimed to belong to it as alleged in the complaint, seeks relief from the actions taken by the City which were based upon the vending machines being admittedly operated without licenses.

By reason of facts found, and the legal conclusions reached, all as hereinafter set forth, I am of the opinion that a decree should be entered denying the preliminary injunctive relief sought by petitioners and finding that the

City ordinances and licensing procedures, and state laws attacked as unconstitutional or unconstitutionally applied are neither. In connection with the foregoing, I enter the following findings of fact and arrive at the following conclusions of law:

1

On October 8, 1969, a bookstore at 12 South Conception Street, Mobile, Alabama, was opened by, stocked by, licensed with business license to and supplied with employees by Robert Mitchum, reputedly of Atlanta, Georgia. The City of Mobile issued a license to Robert Mitchum as the owner of the store. Paragraphs (2) through (6), below, set out involvements concerning licenses for vending machines and the bookstore which the evidence shows in no manner, ultimately, involved the issue of obscenity.

2

During October, 1969, an application for licenses for vending machines was made to the Revenue Department of the City of Mobile and referred to the Police Department, the licenses to be for "Robert Mitchum", of Atlanta, Georgia. The undisputed testimony is that the agents of Robert Mitchum refused to give information sufficient to allow an investigation into the identity and possible criminal record of the purported owner at that time, Robert Mitchum. During this time, the City was without knowledge of the true nature of the vending machines, and consequently did not issue licenses for what could have been gambling machines or some game of chance, as far as is shown by any evidence before me at this time. The bookstore operated during the month of October with no further inter-action of the City or the owner-licensee, Robert Mitchum.

3

During the first week of November, 1969, Robert Mitchum, the store owner and licensee, had, or allowed, vending machines moved into the bookstore purportedly to show movies. The Legal Department of the City of Mobile was advised at this time by the Police Department of the refusal of Robert Mitchum as the owner of the store, and as the intended licensee for the vending machines, to divulge information sufficient to allow an investigation of his background and possible criminal record. Shortly thereafter the Revenue Department of the City of Mobile received a letter from Joe Fine, Attorney of Russellville, Alabama, for "Cine-Matics, Inc.", to which letter was attached a check offered in payment of licenses for the vending machines "owned" by "Cine-Matics, Inc.".

"Cine-Matics, Inc.", an Alabama body corporate, petitioner here, was not in existence during or prior to November, 1969. However, the City was not aware that such was the case, nor was the City aware that no corporation, "Cine-Matics, Inc.", or any of very similar name, whether an Alabama or foreign corporation, was qualified to do business in Alabama during or prior to November, 1969.

4

On or about November 10, 1969, the Legal Department was visited by Attorney Fine, who was in Mobile seeking to have licenses issued for the vending machines which purportedly showed movies, in the name of a corporation styled "Cine-Matics, Inc.". The City Attorney, William H. Brigham, advised that the City must know who was to be held responsible for the operation of vending machines for which licenses were sought, and therefore investigation forms would be forwarded to Attorney Fine with an accompanying letter explaining the information desired by the City. The forms were sent, with letter, on November 13, 1969. There is no doubt that the forms were never returned, the true owner, whomever he or it may be, thereby refusing to divulge the information reasonably necessary for the welfare of the citizens of the City, State and the "other 49 states."

On approximately November 14, 1969, the true owner of the vending machines having refused to divulge information concerning any corporation qualified to do business in Alabama or a suitable individual to whom licenses could be issued for the vending machines, commenced operating the vending machines without licenses. It is here noted that the complaint admits that petitioner Ballew operated the vending machines, on advice of counsel, without licenses for the vending machines. The proof is undisputed that there was no corporation to whom licenses could have lawfully been issued as none was qualified to do business with a name as alleged for the corporate petitioner. The same "counsel" who advised Ballew to operate the vending machines without licenses was aware of this state of facts.

5

On November 18, 1969, the City of Mobile License Code was amended to make definite the amount required for vending machines which showed movies, an annual rate being established therefor. The proof at the hearing showed that the annual license rate was considerably below some rates presently being collected by the City according to the undisputed evidence.

Also on November 18, 1969, an employee of the store, Claude Ballew, as agent of the owner of the vending machines who would not divulge sufficient information to allow determination of a police record, or as agent of a corporation (which, unknown to the City, was not qualified to do business in Alabama), was served notice that the licenses for the vending machines should be paid by whomever was responsible for the vending machines being operated without licenses in the bookstore licensed to Robert Mitchum.

On November 20, 1969, the License Department Investigator, Seale, determined that the vending machines were still being operated without licenses and therefore obtained a warrant for the arrest of Claude Ballew, as the agent of the owner of the bookstore and the owner of the vending machines who allowed the machines to be operated without a license. Claude Ballew was arrested on this charge.

On November 20, 1969, a civil suit was filed against Cine-Matics, Inc., as the owner, or whatever entity was the owner, of the vending machines being operated without licenses, for the money owed on the licenses. As the owner was unknown and apparently a non-resident of the State of Alabama, the only property in Alabama known to be owned by the true owner, the vending machines, was attached to satisfy whatever judgment might be forthcoming under this civil action for money owed. The owner of the vending machines has, as far as any evidence presented shows, refused to demand the return of the machines, and has also **voluntarily** chosen not to obtain possession by following procedures allowed by law in attachment suits. Title 7, Section 876, Code of Alabama.

6

On November 25, 1969, at the next City Board of Commissioner's meeting, the bookstore license was conditionally revoked due to the owner of the bookstore, Robert Mitchum, operating or allowing the operation of unlicensed vending machines in his store, after notice, and contrary to the law of the State of Alabama, as well as the City of Mobile. Title 37, Section 754, Code of Alabama. Notice of a hearing to show cause why the conditional revocation should not be made final was served on the agent of the licensee of the store and on the attorneys for the same, the hearing to be held two weeks subsequent to the conditional revocation.

On December 9, 1969, the hearing on the show cause procedure under the license code of the City of Mobile was held at the regular meeting of the Board of Commissioners. Robert Mitchum was represented by counsel John Coleman of the Mobile bar. The only testimony given at the hearing by any party, which was uncontradicted and which was not denied, was that after notice of license being required and due, the vending machines were operated at the bookstore of Robert Mitchum and were not licensed at the time.

At the time of this "show cause" hearing there had been no conviction on the basis of a violation of the City of Mobile's obscenity ordinance. Apparently as a consequence of this situation, there was no testimony, whatsoever, given at the license revocation hearing concerning any violation of the obscenity ordinance upon which a license revocation could be founded.

Consequently, on the basis, and only on the basis that the bookstore was operated in contravention of the laws of the State of Alabama and the City of Mobile by operating vending machines without licenses, the revocation of the bookstore license of Robert Mitchum was made final by the Board of Commissioners on December 9, 1969.

On May 18, 1970, a civil action in State Court for money owed by Robert Mitchum or the true owner if other than Robert Mitchum, as actual owner of the vending machines for which license fees were due, was filed. This action was filed after the City became fully aware that there was no corporation qualified to do business in Alabama, domestic or foreign, with a styling similar to "Cine-Matics, Inc.", at the time when the vending machines had been operated previously, and at the time when the previous civil action brought against "Cine-Matics, Inc.", had been filed. Attachment in aid of suit against Robert Mitchum was made on the materials in the store, since this was the only property known as supposed to be owned by non-resident Robert Mitchum. This was done in order that the judgment against this non-resident might be satisfied, if and when obtained. There was no proof that Robert Mitchum thereafter sought the return to his possession of these materials by the process of law provided him, or the true owner if other than him. Title 7, Section 876, Code of Alabama.

7

The facts concerning the operation of Robert Mitchum's store in violation of the obscenity ordinance of the City of Mobile as shown at the hearing for preliminary injunction were as follows:

On November 17, 1969, representatives of the City of Mobile bought samples of the various merchandise sold in the store of Robert Mitchum including newspapers, magazines, books and movie film. On November 20, 1969, officers of the Mobile Police Department bought one book from employee Claude Ballew, which book was taken by the officers to the Judge of the City Municipal Court. The Judge examined the book completely and then signed a warrant for the arrest of Claude Ballew for selling the book in violation of the obscenity ordinance of the City of Mobile.

On November 20, 1969, suit was filed by the City seeking an injunction against the operation of the bookstore of Robert Mitchum in violation of the obscenity ordinance of the City of Mobile, the defendants in the injunction suit being served and notice given to the Attorneys for the defendants, John Coleman and Robert Smith. On November

21, 1969 a motion for instanter relief in the injunction action was filed by the City of Mobile and on the basis of affidavits submitted to the Court by citizens of the City of Mobile including the President of Downtown Mobile Unlimited and the Executive Secretary of Downtown Mobile Unlimited, the injunction was issued on this date. The defendants totally failed to appear, file an answer, or request for hearing or any other pleading at any time whatsoever in this case. Consequently a decree pro confesso was entered more than five months later by the State Court (Judge McRae).

On December 12, 1969, Claude Ballew, the employee of Robert Mitchum at the bookstore, was convicted in the Mobile Municipal Court on a single charge of selling a book in violation of the obscenity ordinance, and one charge of operating vending machines without licenses therefor. These cases were appealed to the Circuit Court of Mobile County, State of Alabama, by defendant and are pending therein.

As against the complaint allegations that petitioners are being crushed by delayed vindication of their First Amendment rights, it has not been disputed that plaintiffs have acquiesced for months and months in the postponement of the pending state criminal proceedings. They have neglected during all this time to press for their right to speedy state adjudications or even to press to raise in the state courts the issues of constitutional law they want this court to decide.

Conclusions of Law

8

It was conclusively proven that the Alabama corporation named as one of the petitioners in this proceeding did not even exist at the time the matters alleged in the complaint were alleged to have in fact occurred to, and been the concern of, this "corporate" petitioner and from which it allegedly suffered multitudinous constitutional oppressions. Therefore, the Alabama corporation has no standing to complain of the matters alleged. There was no proof of the existence of a foreign corporation by the name of Cine-Matics, Inc. But even if there were such a foreign corporation, such foreign corporation was not entitled to do business in State of Alabama of the nature alleged in the complaint as it was conclusively proven that no such foreign corporation had ever qualified to do business in Alabama. Therefore, no foreign corporation, if it exists, could have been lawfully issued licenses by the City of Mobile. Any business done by a foreign corporation in Mobile of the nature alleged in the complaint was illegal and violated state law. **Code of Alabama,** Title 10, Section 21(89) et seq; **Constitution of Alabama,** Article 12, Section 232. Any business done by agents or employees of Cine-Matics, Inc., was a violation of State law. Therefore, the corporate petitioner cannot be the real party in interest, if there is such, entitled to relief of some nature in this action, for all the wrongs allegedly done to this corporate petitioner. (See Paragraph 20, infra.)

Robert Mitchum was not a party to this action when filed or upon hearing. He is, apparently, the real party in interest so far as the business and license of "Mobile Book Mart" are concerned. Claude Ballew is not the real party in interest as to these matters, he being merely an employee of Robert Mitchum. Rule 17 (a) of the Federal Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest . . .".

Robert Mitchum, on hearing was shown to be the prime instigator of the complaint in this case. The complaint claims wrongs to a non-existent corporation and wrongs to the license and business interests alleged in the complaint to belong to one shown by the evidence to be a mere employee. Mitchum, by counsel, after the evidence showed his design, sought to amend under Rule 17 (a) and become a party thereunder as the real party in interest. Transcript p. 89. This Court granted the motion to amend in five days, as sought by Mitchum. Mitchum, following his pattern, filed an amendment weeks later based on Rule 19. He alleged that this Court had allowed him to do so.

It is difficult to find that Robert Mitchum comes into this Court with clean hands.

9

Claude Ballew is a real party in interest and does have standing to complain concerning the two arrests made against him. However, these matters are now pending on appeal for trial in the State Court and would appear to be classic examples of those state actions which are prohibited from being enjoined because of the provisions of United States Code, Title 28, Section 2283; vix, the facts of these cases are not within an exception of this injunction statute.

As pointed out above, Cine-Matics, Inc., had no licenses for the operation of the vending machines alleged in the complaint to belong to the corporation, and could not have validly acquired or held licenses. Any act done by Ballew in furtherance of the illegal activities of Cine-Matics, Inc., i. e. operating the vending machines allegedly owned by "Cine-Matics, Inc., an Alabama body corporate" was also illegal. No other person or entity bought the licenses. The arrest for operating the machines without licenses must stand.

10

Assuming, without so deciding, that an injunction might possibly lie under proper facts, the arrest for sale of obscene materials is still of a nature to disallow injunctive relief. Petitioners would have the court hold that no **arrest** may be made without a prior judicial adversary hearing on the issue of obscenity. This is contrary to the law. While there is a great deal of authority to the effect that there must be a prior adversary hearing on obscenity *vel non* before **seizure** there is no U. S. Supreme Court or Fifth Circuit Court of Appeals authority requiring such a hearing before arrest based upon a purchase of the material and examination of the same by a Judge who, on the basis of the examination, signs the warrant (See **Entertainment Ventures v. Brewer,** 306 F. Supp. 802, and **Thevis v. Moore,** decided in the U. S. District Court for the Northern District of Alabama, Southern Division, April 22, 1970).

The U. S. Supreme Court has recently affirmed cases with arrests made as in this case, i. e., after a judicial officer had scrutinized the materials. Milky Way Productions, Inc. v. Leary; New York Feed Co., Inc. v. Leary; 305 F. Supp. 288 (3 Judge Court); Affirmed February 27, 1970, 90 S. Ct. 817.

". . . A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the 'chill' or the 'prior restraint' against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants should issue. All that, like the proceedings of a grand jury, was accomplished ex parte—without either the possible benefit to the accused or the potentially 'chilling' effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of 'prior restraint' because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant, Cf. Near v. Minnesota, 283 U.S. 697, 713-714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

* * * * * * *

At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases." Milky Way v. Leary, *supra*.

11

The acts of the City based on its obscenity ordinance followed, in time, the decision of **Entertainment Ventures v. Brewer**, 306 F. Supp. 802. It is evident to me that the amendment of the City obscenity ordinance, and the method of its application by the City, follow the dictates of **Entertainment Ventures**.

None of the alleged grounds of unconstitutionality of the amended obscenity ordinance are applicable in view of the constructions arrived at in **Entertainment Ventures**. Specifically, I find as in that case that the term "utterly without redeeming social value" is construed into the first sentence of the definition of obscenity found in the amended obscenity ordinance of the City. In fact, there can be no doubt that the City understands that such must be the case, as the ordinance states that (as a thing to be "obscene" must be utterly without redeeming social value), such "obscenity" obviously is utterly without redeeming social value and is therefore a public nuisance.

Furthermore, the evidence is conclusive that no action under the obscenity ordinance, i.e. neither the arrest of Ballew for selling a book nor the seeking of injunctive relief in the state Court against operating a business of selling obscene material, was undertaken on the basis of seized or confiscated materials. All materials were purchased which were involved in these actions by the City and physically submitted to the state court for thorough examination in both cases, before the State court signed the warrant in the arrest case, and before the Court issued the temporary restraining order in the injunctive abatement of a nuisance case. In connection with the use of the purchased materials, I find that, as a matter of law in Alabama, exhibits such as are incorporated into the abatement of a nuisance bill of complaint became an integral part of the complaint itself, as though set out in full therein, including the title and publisher or manufacturer.

12

Therefore, there was no showing that the arrests of petitioner Ballew were done under an unconstitutional state, in an unconstitutional manner. This leaves no basis for enjoining the state court prosecutions of petitioner Ballew.

For these petitioners to satisfy the burden of proof for the right of preliminary injunctive relief, petitioners must show that the injunction is needed to prevent irreparable injury which would otherwise be suffered pendente lite. **Douglas v. City of Jeanette,** 319 U.S. 157, 163-164, 63 S.Ct. 877, 87 L.Ed 1324 (1943); **Clark v. Thompson,** 206 F. Supp. 539, 313 F. 2d 637 (1963).

> "The burden is not met by plaintiffs such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and have chosen simply to

> bypass that avenue of relief in favor of seeking federal intervention. If such delay and disregard of state processes pending the arrival of self-inflicted 'emergencies' could meet the test for a federal injunction, the abrasive devise would promptly lose its 'exceptional' character and would become a commonplace irritant." Milky Way Productions v. Leary, 305 F. Supp. 288, 292, Aff. 90 S.Ct. 817 (1970).

Furthermore the interest to be protected must be personal to the petitioner, since the plaintiff must assert an adequate interest in himself, which the law recognizes even though the public may have an interest in the outcome. **Alabama Federation of Labor v. MacAdory**, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L. Ed. 1725 (1945); **Moores Federal Practice**, Vol. 6A, Paragraphs 57.11, 57.15, 57.18(2). As has been shown above, the petitioners before the court have failed to show that they have or will, sustain irreparable injury from any action of the City applicable to them. Further, it would appear that the probability of these petitioners success on the merits is doubtful. Furthermore, I find it necessary to consider the good faith of the parties, in light of the many allegations in the complaint claimed to be in the name of the petitioners, but which are contradicted by the evidence. **National Fire Insurance Company v. Thompson**, 281 U.S. 331, 338, 50 S.Ct. 288, 74 L.Ed 881 (1930), where it is stated: "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect to the matter concerning which it seeks relief," **Franke v. Wiltschek** (CA 2), 209 F.2d 493, (1953).

13

The foregoing findings of fact and conclusions of law are determinative of the only possible grounds of relief applicable to the petitioners in this action at the time of the hearing. All other claims set out at length in the pleadings apparently apply to Robert Mitchum, as the business owner and licensee, as well as the apparent true owner of the vending machines while causing or allowing the operation thereof in his store.

In order that the numerous issues raised, purportedly concerning the rights of the petitioners, can be viewed in proper prospective, and to clarify the law which actually is determinative of said issues, I make the further conclusions of law, based on the above findings of fact.

14

The evidence shown by the finding of facts leads me to the conclusions that any claim for injunctive relief to prevent the city from seeking its lawfully enacted licensing fees is prohibited by 28 U.S.C. 1341, when considered in conjunction with the available applicable Alabama remedies and relief. The Federal statute is:

> "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law, where a plain, speedy, and efficient remedy may be had in the courts of such state."

15

The applicable Alabama law affording "a plain, speedy and efficient remedy" is found in Title 7, Section 156, et seq., **Code of Alabama.** In summary, the sections of the declaratory relief statute allow immediate injunctive relief from any variety of oppression under confiscatory licensing procedures attempted by municipalities in Alabama. All that is required is that the real party of interest file the action, and be able to prove the basis for relief. **Dunbar-Stanley v. City of Mobile,** 282 Ala. 386, 211 So. 2d 803, cert. den. 394 U.S. 212, 89 S.Ct. 1007, 22 L.Ed.

2d 209; **Bessemer v. Bessemer Theaters,** 252 Ala. 117, 39 So. 2d 658 (1949).

Months passed after the alleged wrongs to petitioners, with no resort to state court procedures, before this federal action was filed. **Milky Way Productions v. Leary,** 305 Supp. 288, 292, Aff. 90 S.Ct. 817 (1970).

16

Furthermore, the City was following the law of Alabama in adopting the amendment to the license code, designated Paragraph 414(h) in relation to vending machines which show movies. See **Bessemer Theaters v. Bessemer,** 261 Ala. 632, 75 So. 2d 651 (1954), and the authorities therein cited, on necessary and permissible legislative discretion of municipalities adopting revenue measures under licensing procedures. Therefore, I find that paragraph 414(h) was not an unconstitutional license fee that need not be complied with by petitioners, or specifically the store owner and vending machine owner.

17

Much is made in the pleadings of the license revocation procedures of the City. This court takes judicial notice of the ordinances of the City of Mobile. **Monk v. City of Birmingham,** 87 Fed. Supp. 538, D. C., N. D. Ala. S.D. (1949); Title 7, Section 429(1), Code of Alabama, 1940 as amended. Upon examination of Section 30 of the License Code of the City, I find that the procedural safeguards of due process are available to licensees upon conditional, and hearing for final, revocation of City licenses. See copy of Section 30 attached hereto. Certainly no proof was offered to show that the exact procedure outlined by the License Code was not followed. In fact, I find to the contrary, and find the store owner and licensee had every opportunity to present evidence that the statutes of the state and city with regard to operating vending machines without licenses had not been breached, but presented no such evidence. In this regard, see **Dean's Dry Cleaning v. City of Chicago** (CA 7), 123 Fed. 2d 104-105 (1941).

> "A federal court will rarely interfere through temporary (or permanent) injunction, with the conduct of municipal government by the city's administrative officers. This general rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the city, and which business is of a public nature".

18

There is no doubt that the petitioners herein at the time of the hearing had no proprietory interest in the store during the operation in 1969 or 1970. But the unrefuted evidence shows that rather than the store owner stopping the operation of the store due to fear of being in contempt of the state court instanter injunctive order in the abatement of a nuisance action, as alleged in the complaint, the store owner apparently held the decree of the state court in contempt, as shown by his complete refusal to file any denial, answer or pleading in the action whatsoever. More particularly, the store owner refused to seek the immediate hearing which was his legal right in the proceeding. "Motions to dissolve injunctions . . . may be submitted during the call for motions on one day's notice . . .", Title 7, Equity Rule 93, **Code of Alabama,** as amended.

Actually, the out-of-state store owner re-opened his store in complete **defiance** of the state court order in April, 1970. Any claims for relief from threats or suppressions due to the writ of the abatement of a nuisance action were held to be baseless, if not a complete sham.

I further find that there was no "censorship" or "prior restraint" or "suppression" due to the actions of the City in the civil suits filed to obtain the money due for licenses on the vending machines. The evidence is undisputed that the vending machines were used, and license mony was due from someone under the Alabama law. Title 37, Section 751, 754, **Code of Alabama**, as amended, as well as the City License Ordinance. The petitioner, Cine-Matics, Inc., a body corporate of the State of Alabama, claims to have owned the vending machines at the time of the use of the machines at 12 South Conception Street, Mobile, a specious claim under the evidence. But the same specious sham was held out to the City in November of 1969 by agents of the unknown true owner. Therefore the suit brought by the City against Cine-Matics, Inc., for money owed in November, 1969, was in good faith reliance by the City on the petitioner's fraudulent representations of ownership at that time. Since petitioner Cine-Matics, Inc. would not furnish the names of any corporate officers or information which could show an organization to meet financial responsibilities to the City and State, the only known connection of Cine-Matics, Inc. to the State of Alabama was attached, under bond, to satisfy money owed by the petitioner (though in actuality owed by the true owner of the vending machines).

When the store of Mitchum re-opened without license and by continuing to ignore the State Court injunction action, the store materials of Robert Mitchum were also attached for the money still owed for vending machine licenses. This attachment was done after the petitioners filed the Federal Court action attempting to have this court believe there was a lawful manner in which petitioner Cine-Matics, Inc., owned the vending machines during November, 1969. Since the evidence shows this could not be the case, the owner of the store can reasonably be seen as the owner of the machines when they were in use in November, 1969, in Alabama. But the evidence shows he is admitted to be a non-resident, allowing attachment of his only known assets in Alabama in aid of suit for money owed.

Robert Mitchum, as owner of the bookstore materials and vending machines attached could have, and can now follow the known law of Alabama, Title 7, Section 876, **Code of Alabama**, and thereby obtain possession of the bookstore materials and vending machines at any time. This was the case on the very days on which the vending machines and the store materials were attached. Therefore, there is no "suppression," "prior restraint," or "censorship" of First or any other amendment rights, by the actions of the City in the civil actions for money due.

20

I further find that the procedures of the City in inquiring into the nature of the vending machines to be installed within the City, as well as inquiring into the person, firm or entity who purportedly is to be the licenses of such machines, are reasonable and do not violate any constitutional mandate. States must be allowed to regulate the doing of business by corporations within the State's boundaries, e.g. for protection of the property rights of the citizens, and to ensure that corporations will be amenable to suit in Alabama Courts. Such is the purpose of the registration of corporation statutes, as well as the state Constitutional provision of Article 12, Section 232, Constitution of the State of Alabama, **Code of Alabama**, as amended. "They constitute a police regulation for the protection of the property interests of the citizens of the state . . . The doing of a single act of business, if it be in the exercise of a corporate function, is prohibited. The policy of the Constitution and statute is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in favor of citizens having cause of complaint.'' **Alabama Western R. Co. v. Talley-Bates Const. Co.**, 162 Ala. 396, 402-403, 50 So. 341, 342. See **Armour Packing Co. of La., Ltd. v. Vinegar Bend Lumber Co.**, 149 Ala. 205, 42 So. 866; **George M. Muller Mfg. Co. v. First National Bank of Dothan,** 176 Ala. 229, 57 So. 762. The City governing body was the further obligation to prevent, before its inception, business by persons or entities known to have tendencies to criminal activities, such as operating gambling devices or games of chance by means of vending machines. The fraud attempted to be perpetrated on the State of Alabama and City of Mobile during November of 1969, and conclusively shown by the evidence in this case concerning the petitioner Cine-Matics, Inc., shows the complete reasonability of such necessary City investigations, and therefore the constitutionality thereof.

> ''A federal court will rarely interfere through temporary (or permanent) injunction, with the conduct of municipal government by the City's administrative officers. This general rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the City, and which business is of a public nature.'' **Dean's Dry Cleaning v. City of Chicago** (CA 7), 123 Fed. 2d 104-105 (1941).

All other injunctive relief sought by the plaintiff will be denied.

10/16/70.

/s/ DANIEL H. THOMAS
District Judge

APPENDIX B

381a. Television Broadcasting Stations $200.00
Provided, however, this license shall not apply to that portion of the business that may be in Interstate or Foreign Commerce or to business done with the Government of the United States. (1-1-64)

399.5 Travel Agencies, shall pay a license of $30.00 on the first $6,000.00 or less of gross commissions for the year next preceding plus an amount equal to ½ of one per cent on all such gross commissions in excess of $6,000.00.

a. Travel Agencies, dealing in the sale of transportation only .... $ 30.00
(4-27-65)

413. Vehicles Motor, carrying goods or merchandise and/or dirt, clay, sand, soil or other building material for hire or reward:

(a) where rated capacity is less than two tons .... $ 10.00

(b) where rated capacity is two tons or more and less than three tons .... $ 30.00

(c) where rated capacity is three tons or more and less than four tons .... $ 40.00

(d) where rated capacity is four tons or more .... $ 50.00

(1-1-65)

Section 29. Any license issued hereunder may, in the discretion of the Board of Commissioners of the City of Mobile, be revoked or suspended, for a term not exceeding the term of such license, when said Board shall be satisfied that such licensee is doing business in violation of any penal law of the State of Alabama or of the City of Mobile. (12-13-61)

Section 30. Procedure for Revocation or Suspension of License. If said Board shall determine that the license issued hereunder shall be revoked or suspended on any ground set out in Section 29 hereof, said Board shall adopt a resolution to that effect, and as a part of said resolution shall conditionally revoke or suspend said license, as the case may be. The Clerk of the City of Mobile shall thereupon give written notice to the licensee of the action of the Board of Commissioners and shall attach a copy of such resolution to such notice. Said notice shall advise the licensee that the revocation or suspension shall become final at the second regular meeting of the Board of Commissioners following the passage of the resolution conditionally revoking or suspending such license, unless the licensee shall appear before the Board of Commissioners at such time and place stated in said notice and then and there show cause why such license should not be revoked or suspended, as the case may be. Said notice shall give the date, time and place of the hearing before the Board of Commissioners, and the licensee shall be given the opportunity at such time and place to be heard, and may appear and may have the benefit of counsel. If the licensee fails to appear either in person or through his attorney, the revocation or suspension shall be made final by the Board of Commissioners, and if such licensee should appear by himself or through his counsel, or both, the Board of Commissioners shall proceed to hear evidence which may be presented for and against such revocation or suspension. Said Board may, in its discretion, either continue the hearing for good cause shown, or may enter an order making the revocation or suspension final, or may permit the licensee to retain his license so long as he does not violate any penal law of the

State of Alabama or of the City of Mobile. Whenever a license is revoked or suspended and the revocation or suspension is made final by the Board of Commissioners, written notice of such action shall be given by the Clerk of the City of Mobile to said licensee. All notices provided for in this section to be given by the Clerk shall be deemed sufficient when deposited in the United States Mail, postage prepaid, addressed to the licensee at the address on file in the Office of the City License Officer. (12-13-61)

Section 31. It shall be unlawful for any person, firm or corporation to do business within the City of Mobile or within its police jurisdiction without having obtained from the City License Officer a license under this Ordinance, and it shall be unlawful for any person, firm or corporation whose license has been revoked or suspended in accordance with Sections 29 and 30 hereof to do business within the City of Mobile or within its police jurisdiction so long as such revocation or suspension shall remain in effect. Each day any violation of the provisions of this section shall continue shall constitute a separate offense. (12-13-61)

Section 32. The continued or recurrent performance of any act or acts within the corporate limits of the City of Mobile or within its police jurisdiction for which a license issued by the City of Mobile may be revoked or suspended under the provisions of this Ordinance is hereby declared to be detrimental to the health, safety, comfort and convenience of the public and is a nuisance. The City of Mobile, as an additional or alternative remedy, may institute injunctive proceedings in a court of competent jurisdiction to abate the same. (12-13-61)

Section 33. It is hereby declared to be the intention of the Board of Commissioners that the sections, paragraphs, sentences, clauses and phrases of this Ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance, since the same would have been enacted by the Board of Commissioners without the incorporation in this Ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section. (12-13-61)

APPENDIX C

JUDGMENT AND ORDER

(Number and Title Omitted. Filed Oct. 16, 1970)

In conformity with a memorandum opinion filed contemporaneously herewith:

It is ordered, adjudged and decreed by the Court as follows:

1. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) is constitutional as written and petitioners' prayer to have the ordinance declared void is hereby denied.

2. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

3. Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been applied to petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of enforcement is denied.

4. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, are constitutional as written and petitioners' prayer to have the ordinances declared void is hereby denied.

5. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

6. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been applied to petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of application is denied.

7. Code of Alabama, Title 37, Sections 505 and 506 are constitutional as written and petitioners' prayer to have the statutes declared void is hereby denied.

8. Code of Alabama, Title 37, Sections 505 and 506 have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied, as applies to Case No. 75773 in the Circuit Court of Mobile County, Alabama, in Equity.

9. Code of Alabama, Title 37, Sections 505 and 506 have not been applied to petitioners in an unconstitutional manner, in Case No. 75773 in the Circuit Court of Mobile County, Alabama, and the petitioners' claim for relief is denied.

10. Petitioners claim for relief in all other aspects is denied.

Done this 16th day of October, 1970.

s/ DANIEL H. THOMAS
District Judge

APPENDIX D

NOTICE OF APPEAL

(Number and Title Omitted. Filed Nov. 13, 1970)

Notice is hereby given that Robert Mitchum as owner of the Mobile Book Mart, Claude D. Ballew and Cine-Matics, Inc., a body corporate of the State of Alabama, Plaintiffs herein, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of the Honorable Daniel H. Thomas denying injunctive relief as sought in the Complaint entered in this action on the 16th day of October, 1970.

s/ JOHN COLEMAN
Attorney for Appellants Robert Mitchum,
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